CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

The State of Missouri

AT THE

OCTOBER TERM, 1882.

(Continued from Volume 76.)

THE CITY OF ST. LOUIS v. MEIER, *Appellant.*

1. **Conditional Dedication**: STREETS. A dedication for a street on condition that the street shall be extended by the neighboring proprietors without expense to the dedicator, and cannot be accepted by the city by instituting proceeding to condemn the land of the neighboring proprietors. Whether the dedicator should be charged with benefits for the extension would depend upon the charter of the city, and could not be controlled by agreement of the parties.
2. ——: ——. A dedication can take effect only according to its terms. Hence, where land was dedicated for a street on condition

that neighboring proprietors should dedicate the same street through their lands; *Held*, that the opening of the street, by the city by condemnation, through the other lands, did not amount to a fulfillment of the condition.

3. **Street Opening**: ASSESSMENT OF BENEFITS. The owners of land affected by the opening of a street, appeared before the commissioners appointed to open the street through neighboring lands, and consented to the opening through their land on condition that no benefits should be assessed against them; and the commissioners agreed; *Held*, that this arrangement was illegal, as tending to render the assessment of benefits against others unequal and partial.

4. ——; ——. Commissioners appointed to open a street through lands adjoining the lands of the heirs of K. omitted to assess benefits against them on the ground that they had agreed that the street should be opened through their land and that the value of the land occupied by the extension would be equal to the benefits. *Held*, that the commissioners had no right to take this into consideration, and their having done so invalidated the assessment made against other land holders.

5. ——; ——. A conveyance of property sought to be condemned for a street, made after the institution of proceedings to open the street and with the purpose of enabling the grantor to escape an assessment of benefits, is properly disregarded by the commissioners.

Appeal from St. Louis Court of Appeals.

REVERSED.

A. M. Gardner for appellant.

1. The duty of the commissioners, under the charter (art. 6, § 2), was to ascertain the actual value of the land taken, the damages done to the property, and for the payment of such values and damages to assess against the city the general benefits, and the balance against the owners of all property which should be specially benefited by the proposed improvement. Neither the ordinance nor the proceedings under it, in any way seek to appropriate the Kingsland tract, nor are the owners of that tract noticed or are in any way made parties to these proceedings. We submit that the commissioners, in considering the value of

this tract exceeded their authority. The ordinance did not seek to establish or open Ninth street over or through the Kingsland tract, and hence the only jurisdiction the commissioners could have was to assess benefits against it in case they found it specially benefited by the proposed improvement; and yet admitting that the Kingsland tract was benefited, they assume to balance these benefits by the supposed damages, a matter over which they had no jurisdiction whatever. In other words, these commissioners assumed to construe the Kingsland deed—to pass upon the validity of the proposed dedication, and to accept the verbal statement of the Kingslands' attorney that they would not object to the opening of the street in question, provided they, the Kingslands, were not assessed with benefits. All of which was clearly irregular and illegal. The effect of it was to exempt this property and thereby compel the property owners north and south, including these defendants, to pay a greater tax than they would had the assessment been equalized over all the property benefited.

2. The commissioners had no right to pass upon the validity, purpose and motive of the conveyance to E. D. Meier. They should have accepted the facts as shown to exist, made their report in accordance therewith and left the question of ownership, the validity of the title, and the effect of the conveyance upon these proceedings to be determined by the court.

3. The act of the city in instituting these proceedings was not an acceptance of the Kingsland dedication. *Cass Co. Supervisors v. Banks*, 44 Mich. 467.

4. Had the condition in the deed of dedication been that the lot owners in said Kingslands' subdivision should be exempt from the assessment of benefits in the opening of Ninth street, which was the practical effect the commissioners assumed to give it, such a dedication would have been without force, even if accepted by the city. It would be in the nature of a private agreement between the city and the Kingslands, binding neither the defendants in this

case nor any other property owner affected by the opening of the street. *Tyler v. St. Louis*, 56 Mo. 60.

5. The dedication not being absolute when the present charter took effect, became a nullity because it does not conform to section 1, article 1 of the charter.

6. The appearance of the Kingslands before the commissioners with their verbal offer to confirm the dedication made by their ancestor, provided their land was not assessed with benefits, could not in any way affect the condition of the deed or the *status* of the parties to these proceedings, and should have been entirely disregarded by the commissioners.

Leverett Bell and *James E. Withrow* for respondent.

Leroy Kingsland dedicated Ninth street substantially on this condition: that it should be opened to the next street north and south without expense to him or his grantees. By not making the Kingslands parties to this proceeding the city has elected to accept that dedication, and exempt them from benefits inasmuch as they have contributed their full share to this improvement. *Rector v. Hartt*, 8 Mo. 448; *Becker v. St. Charles*, 37 Mo. 18; *Rutherford v. Taylor*, 38 Mo. 315; Dillon on Munic. Corp., § 505. The city having accepted the dedication in full compliance with the terms upon which it was made, the commissioners could not have made a valid assessment of benefits against the Kingslands. The Kingsland dedication takes effect the moment that Ninth street is dedicated or opened from Bremen avenue to Angelica street without expense to him or his grantees. 37 Mo. 13; 38 Mo. 315. The pretended sale of this property by Adolphus Meier to his son E. D. Meier, pending the proceedings, was a sham, and was, therefore, properly ignored by the commissioners. The rule is well settled that "Every person purchasing an interest in an estate during the pendency of a suit affecting the title to the same, is bound by the judgment in such

suit, without being made a party to the same." Washb. on Real Prop., (3 Ed.) p. 229, § 8; Story Eq., §§ 405, 407.

HOUGH, C. J.—This is a proceeding instituted in the circuit court of St. Louis on the 14th day of February, 1878, to open Ninth street in said city. At the time of the institution of this proceeding, Ninth street was already open north and south of the land proposed to be taken. The intervening space interrupting the continuity of said street and involved in this suit, was 595 feet in length north and south, and sixty feet wide, that being the width of Ninth street, and was owned by the following named persons, in the order stated: 275 feet by Adolphus Meier, eighty feet by the Kingsland heirs, eighty feet by the Sarpy estate, and 160 feet by Margaret Walther; and each of these parties owned land on either side of the several strips above described.

In 1865 Leroy Kingsland filed with the recorder a plat of a subdivision of certain land owned by him, which included the eighty feet mentioned above as belonging to the Kingsland heirs, and made thereon the following dedication: "First and Ninth streets and alleys as indicated above are also dedicated to public use, provided the owners north and south of the above subdivision will dedicate the same streets and alleys through their respective tracts without expense to the owners of the lots of the above subdivision." Ninth street as indicated on this plat covers the strip eighty feet long and sixty feet wide belonging to the Kingsland heirs.

In instituting this proceeding the city acted upon the idea that this street had been dedicated to public use, and did not, therefore, seek to condemn it, and the commissioners recognizing the dedication as having been made upon the condition that Ninth street should be opened up north and south of the land dedicated without any expense to the owners of the lots in said Kingsland addition, lying east and west of said dedicated strip, did not assess any

benefits against said lots. Indeed no mention whatever is made of the Kingsland property in the report of the commissioners, although it appears upon the plat accompanying that report, as a part of the territory through which Ninth street is proposed to be extended, and which will be benefited thereby.

George S. Drake, one of the commissioners, testified that they assessed no benefits against the Kingslands because of their dedication; that if no dedication had been made, the Kingsland land would have been benefited as much as the other land north and south; that the attorney of the Kingslands was present and stated that they would not object to the opening of the street if the commissioners did not assess any benefits against their land, and that the commissioners could not award any damages to the Kingslands and thought it but fair not to assess any benefits against them. E. G. Obear, another of the commissioners, testified that the Kingsland land would receive as much benefit as the other land north and south, but that they did not assess it with benefits because of the dedication. E. C. Cabell, the third commissioner, testified that they ratified the conditional dedication, and were of opinion that if the land was not dedicated, the damages and benefits would be equal. He further stated that a plat and dedication were shown to the commissioners, to the effect that the street was to be opened without cost to the representatives of Leroy Kingsland.

It may well be doubted whether the dedication by Leroy Kingsland of the strip eighty feet long and sixty feet wide for Ninth street could be accepted by the city by instituting proceedings for the condemnation of the land north and south of it. Such proceedings do not fulfill the condition of the dedication. The condition was that the property owners north and south of him should also dedicate a strip sixty feet wide through their lands. Kingsland must be supposed to have known that he could not legally make, and that the city could not legally accept a

dedication by him upon condition that when the city should condemn the land north and south of him, he should not be assessed with benefits. Whether he would be liable to be assessed with benefits would depend upon the provisions of the city charter, and not upon the agreement of the parties. Besides the owners of the land north and south of him could not by any arrangement between him and the city, be made to bear any portion of the tax for benefits which would otherwise be chargeable against his property.

The dedication indorsed upon the plat filed by Kingsland, must, it seems to us, take effect according to its terms, or not at all. Kingsland knew that if all parties dedicated a strip sixty feet wide through their lands, no condemnation could take place and no benefits could be assessed; and he also knew that if they did not make such dedication, and it became necessary to condemn their land, he would be liable to be assessed with benefits, although he should give a strip for Ninth street through his land.

Nor could his legal representatives rightfully escape an assessment for benefits by appearing before the commissioners and consenting to the opening of Ninth street through their land upon condition that they should not be assessed. Such an arrangement is an evasion of the law, and may render unequal and partial the special tax assessed to pay the damages awarded for the land taken.

Nor could the commissioners lawfully relieve the Kingsland property from an assessment for benefits by an imaginary balancing of such benefits against the value of the land not condemned. They had no right to consider the value of the land not taken, and which they regarded as having been dedicated.

No dedication having been made by the owners north and south of Kingsland, and no unconditional dedication having been made by the representatives of Kingsland, the only proper method of proceeding was to condemn the Kingsland land.

We regard the ordinance as valid, and are of opinion that the commissioners properly disregarded the conveyance of Adolphus Meier to his son E. D. Meier of the property sought to be condemned. It was made after the institution of this proceeding, and from the testimony was evidently a device merely of Adolphus Meier to escape from an assessment for benefits.

The judgment of the court of appeals and of the circuit court will be reversed and the cause remanded. The other judges concur.

WHERRY, *Appellant*, v. HALE.

1. **National Banks**: DEALINGS WITH REAL ESTATE: TRUSTS. To avoid the supposed effect of certain provisions of the National Banking Act, a national bank caused certain real estate which it was taking for debt to be conveyed to an individual. *Held*, that the conveyance created a trust in favor of the bank, and a subsequent conveyance by the grantee to a trustee for a receiver of the bank, so far from being a fraud upon his individual creditors, was an execution of the trust which, if it had been refused, a court of equity would have compelled.
2. ——: ——. National banks are authorized to hold and convey such real estate as they shall purchase at sales under judgments, decrees or mortgages held by them to secure debts due them.
3. ——: ——: ULTRA VIRES. If a national bank violates the National Banking Act in dealing with real estate, the remedy is in the hands of the government only. A stranger to the transaction cannot impeach it.

Appeal from Johnson Circuit Court.—HON. NOAH M. GIVAN, Judge.

AFFIRMED.

S. T. White for appellant.

1. The deed conveying the Sharp-Emery farm should

have been held fraudulent, voluntary and void, 1st, Because no trust was created in Ridings at the time the land came to him, and any subsequent act of the parties could only be founded upon a new consideration, of which there was no allegation or proof. 1 Perry on Trusts, § 133; *White v. Carpenter*, 2 Paige 217; *Rogers v. Murray*, 3 Paige 390. 2nd, Granting that at the inception of the estate in Ridings, the parties intended to create a trust, its purpose, according to defendant's evidence, was to evade the National Banking Law, and was illegal. The National Banking Law forbids national banks dealing in real estate securities. While this court, in *Matthews v. Skinker*, 62 Mo. 329, has differed from the United States Supreme Court, (98 U. S. 62,) as to the remedy, both courts decided that the transaction was contrary to the statute. R. S. U. S. §§ 5136, 5137. No trust can grow out of a transaction made to evade the law. Perry on Trusts, § 131; *Chapin v. Pease*, 10 Conn. 69. The defendants are estopped by the acts of the bank from claiming that the trust was an existing one, and was a good consideration for the deed. 1 Story Eq., (10 Ed.) § 384; *Meaux v. Caldwell*, 2 Bibb 244; *McDermott v. Moreland*, 19 Mo. 204; *Susong v. Williams*, 1 Heisk. 625; *Smith v. Greer*, 3 Humph. 118; *Nicholas v. Ward*, 1 Head 323.

The other deeds should have been declared fraudulent, for the reason that they were gifts on their face, and had none of the provisions of mortgages, and did not purport to secure any debts. They were mere appropriations of property. The evidence showed that the debts purported to have been secured by them were illegal. (1) The receiver had no vested interest. The land was simply placed in Hale's hands, with authority in him to sell and pay debts Ridings might owe the bank. It is the same as if Ridings had left money in Hale's hands directing him to pay certain debts. If another creditor should attach it before it was appropriated as intended, the attaching creditor could get the money. So here we attached before Hale appro-

priated it to the payment of the debts, and while he was merely a voluntary grantee, and he can set up no rights against us. (2) The debts of Ridings to the bank are illegal. The capital of the bank was $100,000. The bank claims $82,000 liabilities of Ridings to be secured. This was in violation of section 5200, U. S. R. S. *Penn v. Bornman*, 102 Ill. 523; *s. c.*, 14 Reporter 393.

O. L. Houts for respondents.

Loans and discounts of a national bank are valid and recoverable although in excess of one-tenth of its capital stock. *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Shoemaker v. National Bank*, 2 Abb. (U. S.) 416; *Stewart v. National Bank*, 2 Abb. (U. S.) 424; *Allen v. National Bank*, 23 Ohio St. 97; *O'Hare v. National Bank*, 77 Pa. St. 96; Thompson's Nat. B'k Cas., pp. 151, 169, 175, 828, 869. Ridings had a right to secure the bank. If, therefore, the land was his own, and not held in trust for the bank, the conveyances were valid. *Shelley v. Boothe*, 73 Mo. 74. But the trust was fully made out by the evidence. The provisions of the National Banking Act interpose no obstacle. The 28th section of the act expressly authorizes the purchase, and it might as well have been made in the name of the bank. 98 U. S. 621. It is immaterial whether the notes which the land was conveyed to secure were transferred to the bank for a past indebtedness or not, for it is held that though the transfer be for a debt created at the time, and in violation of the act, the transaction is good as against the whole world, and can be attacked only in proceedings by the government against the bank to forfeit its charter. 98 U. S. 621.

HENRY, J.—This is a suit to set aside certain conveyances of real estate made by A. W. Ridings to Hale in trust for the receiver of the First National Bank of Warrensburg, on the ground that they were without considera-

tion, and made with the intent to hinder, delay and defraud creditors.

Plaintiff, prior to the institution of this suit, had sued Ridings in attachment, under which the lands in controversy were levied upon. He obtained a judgment in that suit. The deeds from Ridings were executed and recorded, except one, before the levy of the attachment, and that deed was not recorded until after. The defendant denied the fraud, and alleged that Ridings was largely indebted to the bank, at and prior to the date of the conveyances made by him; that of said lands the bank was the real owner of a portion, and Ridings held them in trust for the bank, and conveyed them to the bank in execution of the trust and the balance to secure his indebtedness to the bank. The evidence was that the lands were all held by Ridings under deeds which expressed no trust; that he stated repeatedly that he owned the lands and the Marlatt property, which the defendant alleges he held as trustee for the bank. This land was what is known as the Sharp and Emery lands. The cashier of the bank testified that Ridings for the bank purchased the above named property under a deed of trust given to secure notes which had been assigned to the bank. This was his understanding. Ridings paid nothing for it. The conveyance was so taken for convenience, and because attorneys advised that it was better on account of provisions of the National Banking Law, which they thought would give the bank trouble. It was the understanding of Gen. Cockrell and J. J. Cockrell that Ridings held the land for the bank, and in October, 1878, Ridings executed a writing under seal, never recorded however, declaring that he held the land for the bank. Lee W. Jack, assistant cashier of the bank, testified that the Marlatt property and the Emery farm were held by Ridings for the bank; that the attorney's receipts for the notes which were secured by the lands, were carried in the bank books as past due papers. On the other hand the bank never made any statement showing that directly or

indirectly it held any land. Its public statements of assets and liabilities, made by the bank, contained no mention of land. On the evidence the circuit court found for defendants and rendered a judgment from which this appeal is taken.

We have failed to discover any evidence to prove that Ridings' purpose in making the conveyances was to defraud his creditors. There is not a scintilla to show any participation by the bank in any fraud, even if Ridings intended it. He was indebted to the bank in the sum of $82,638.59. He was reputed to be wealthy; and Gen. Cockrell testifies that he would, if called upon, have sworn that he was worth $50,000 over and above all liabilities.

Plaintiff testifies that he lent him the money for which he sued, "on the faith that he owned this and other property." He does not say or intimate that he would not have done so, if he had known that he did not own this property, which constituted but a small portion of his reputed wealth.

The circuit court, no doubt, found that there was no fraud in the transaction between Ridings and Hale or the bank, but that Ridings held the Sharp and Emery land and the Marlatt property in trust for the bank. The repeated declarations of Ridings that he owned the lands were consistent with the reasons assigned by the bank for having him hold the lands in his own name. It would have defeated the object they had in that arrangement if it had been proclaimed that he held the lands otherwise than as the deeds expressed. This was not an arrangement made to impose upon any one, but one of convenience. Ridings paid nothing for the land, and in fact, as the testimony shows, held it for the bank, and all the evidence which seems to conflict with that view of the case, are Ridings' declarations that it was his, prompted no doubt, by a desire to withhold from the public the fact that the bank owned any lands. Holding for the bank, the conveyance of the lands to its trustee for the receiver,

1. NATIONAL BANKS dealings with real estate. trusts.

was but the execution of a trust reposed in him, which a court of equity would have compelled had he refused. *Payne v. Twyman*, 68 Mo. 339.

There was nothing in the transaction violative of the National Banking Act, nor is there any provision of that 2. ——: ——. law which would have prevented the bank from taking a deed to the property in its own name. That act authorizes such banks to hold and convey such real estate as they shall purchase at sales under judgments, decrees and mortgages held by such associations or to secure debts due to such associations. The Sharp-Emery land and the Marlatt property were sold under deeds of trust given to secure notes assigned to the bank by the holders thereof.

But, if it had been otherwise, in the case of the *Union National Bank v. Matthews*, 98 U. S. 621, it was decided by 3. ——: ——: ultra vires. the Supreme Court of the United States that a breach of that section of the act cannot be taken advantage of by the person dealing with the bank, but only by the government. Certainly the plaintiff in this case, who was no party to the transaction, cannot impeach the transaction in question as violative of the National Banking Law.

No actual fraud having been proved to affect the conveyances, the right of Ridings to prefer one *bona fide* creditor to another cannot be questioned, and on that ground the conveyances of the property other than the Sharp and Emery land are beyond question. They were made and recorded before plaintiff's attachment was levied, and that question which has been raised as to the conveyance of the Sharp Emery lands does not arise with respect to the other property. The attachment was levied after the execution of all the deeds in question, but before the deed conveying the Sharp-Emery land was recorded.

The attachment only held Ridings' interest in the land. The conveyances made by him were not of his interest in the land. They simply conveyed to the bank what in equity

belonged to the bank before they were executed, and all fraud out of the case, there can be no question that the title of the bank was good as against creditors of Ridings. The judgment is affirmed.

FRETWELL, *Plaintiff in Error*, v. LAFFOON.

1. **New Trial**: SURPRISE. "Surprise," as used in the statute in relation to new trials, (R. S. 1879, § 3704,) denotes an unforeseen disappointment in some reasonable expectation against which ordinary prudence would not have afforded protection. If there is any element of negligence in the case there is no surprise.
2. ——: MISTAKE. Mistake growing out of forgetfulness or heedlessness is not such mistake as will authorize a new trial under this section of the statute.
3. ——: CASE ADJUDGED. The answer of a garnishee admitted that he had executed two notes in favor of Daniel Hibler, the defendant, both of which were secured by a recorded deed of trust, and one of which was paid. A year afterward judgment was rendered against him on this answer for the amount of the second note. In the meantime he had paid this note. Both notes were in point of fact payable to *Samuel* Hibler and not to *Daniel* Hibler. The garnishee moved for a new trial alleging these facts and also that he had not discovered the mistake in his answer till after the judgment. The motion was sustained by the trial court. *Held*, error.
4. **Garnishment**: ATTORNEY'S NEGLIGENCE. A garnishee is bound by his attorney's negligence the same as any other defendant.
5. **Garnishee's Liability on Notes.** If the answer of a garnishee admits the execution of a note in favor of the defendant, and does not show that the note is negotiable or has been assigned to some person named, the plaintiff will be entitled to judgment on the answer.

Error to Cass Circuit Court.—HON. NOAH M. GIVAN, Judge.

REVERSED.

This was a proceeding by garnishment against Laffoon, who was summoned as debtor of Daniel Hibler, the de-

fendant in the principal case. On the 19th day of July, 1878, Laffoon answered, and on the 23rd day of July, 1879, judgment was rendered against him upon his answer. On the following day a motion for new trial was filed, and subsequently sustained. The plaintiff excepted to this action of the court and refused further to prosecute his action, whereupon the court dismissed the same for want of prosecution, and the plaintiff sued out his writ of error.

Allen Glenn and *Railey & Burney* for plaintiff in error.

Wooldridge & Daniel for defendant in error.

I.

SHERWOOD, J.—Did the circuit court err in granting the garnishee's motion for a new trial?

Our statute authorizes the verdict to be set aside, and the granting of a new trial, "where there has been a mistake or surprise, of a party, his agent or attorney," etc. R. S. 1879, § 3704.

Surprise in the sense here used, is nearly allied to accident, which is a prominent subject for equitable relief. 3 Grah. & Wat. on New Tr., 874. Of accident Mr. Justice Story says: "By this term is intended not merely inevitable casualty or the act of Providence, or what is technically termed *vis major*, or irresistible force, but such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct in the party." 1 Story Eq. Jur., § 78. In the *People v. Superior Court*, 5 Wend. 114, where an application was made for a mandamus to vacate a rule granting a new trial, a peremptory writ was awarded on the ground that the trial court had improperly granted the new trial, basing its action on the ground of newly discovered evidence, the supreme court holding that the mover for a new trial was guilty of gross negligence in not discovering prior to the first trial, that the witness was a material witness, and that

moreover the testimony was merely cumulative. And it was there contended that though the lower court might have erred, yet that the granting of a new trial was a matter of discretion, not depending on any fixed or established rules of law, and, therefore, that the supreme court could not interfere; but that court held that there were certain principles applicable to new trials which were clearly settled and well defined by long continued practice, and an uninterrupted series of decisions of that and other courts, and after stating those principles, among which was, that a party is bound and presumed to know the leading points that were to be litigated in his case, remarked: "In cases to which these principles clearly and unquestionably apply, the granting or refusal of a new trial is not a matter of discretion. The parties have a legal right to a decision conformable to those principles. Where there is doubt upon the point of negligence, or as to the character of the evidence, or as to its materiality, it becomes a matter of discretion, and the court will not, perhaps I ought to say, cannot rightfully interfere. But no such doubts exist in this case. * * We think it, therefore, a proper case for a mandamus. It is very possible that the purposes of justice might be subserved in this individual case by the granting of a new trial; but general principles, whose operation has been found salutary, and which have grown into authority under the sanction of repeated decisions, and almost immemorial usage, cannot yield to the hardship of particular cases. It is of cardinal importance that the rules and principles which regulate the proceedings and decisions of courts should be uniform and stable. The security of the citizen is essentially increased whenever the territory of undefined discretion in any of the departments of our government is circumscribed by the establishment of well defined and clear principles."

In *Peers v. Davis*, 29 Mo. 184, this court, per Ewing, J., approvingly citing 3 Grah. & Wat. on New Tr., 398, said: "Surprise, in its legal acceptation, denotes an un-

forseen disappointment in some reasonable expectation, against which ordinary prudence would not have afforded protection. Where the witness resided—whether forty miles from the place of holding court—was a fact of which the party could readily have informed himself by ordinary diligence; and that it was not known is to be attributed to his own laches; and surprise produced by the laches of a party is never a good cause for a new trial."

The text book just cited states that "if the surprise was owing to the least want of diligence, the applicant will be without sufficient excuse, and his motion will be denied. It is a condition precedent to his attaining relief, that he shall be wholly free from blame. To grant a new trial upon any other terms, would be holding out a premium to inefficiency and remissness, and would inevitably lead to great abuses. The cases universally support this wholesome doctrine."

Proceeding upon this theory of the law, this court in *O'Conner v. Duff*, 30 Mo. 595, held that the motion for a new trial was properly overruled, where the defendants alleged surprise by the testimony of their witness, but it did not appear they had sought any information from him before he was sworn, or made any effort to ascertain what his testimony would be. In another case in this court a similar ruling was made; a defendant claimed that his co-defendant had executed by mistake, one of the two notes sued on; that he was never advised of the mistake; could not discover it by any possible diligence, and never discovered it till after the trial had ended. And the co-defendant corroborated this by affidavit alleging that he was totally ignorant of his being sued on two notes till he was called on the witness stand. Commenting on these facts Wagner, J., observed: "Where a person receives notice of a trial, he is at once put on inquiry. The period of notice is always sufficiently ahead of the sitting of the court, to afford parties full opportunity to ascertain the precise situation of their cause and what testimony they

will require on their trial. And courts will not aid parties where they have failed to take the requisite steps to procure their evidence, and more especially where they have been guilty of unpardonable neglect. Before they ask the court to help them, they must have evidenced a disposition to help themselves." *Richardson v. Farmer*, 36 Mo. 35. The books abound with similar instances.

II.

And in regard to mistake of a party as the ground for a new trial, it seems from the authorities, as well as from sound reason, that while negligence cannot be claimed as surprise, neither can incredible forgetfulness, unpardonable heedlessness or egregious blunder be classed as mistake; honest mistake which properly invokes judicial interposition. We search this record in vain for the elements of either surprise or mistake in their legal acceptation.

III.

Laffoon was garnished, and answered on the 19th day of July, 1878, stating in substance, that on the 1st day of February, next preceding, he had executed two notes to *Daniel* Hibler, one for $500, due and paid in May of that year; the second note, for $600, being due May 1st, 1879, and unpaid, and that he could not say who the owner of the note was. On the 23rd day of July, 1879, judgment was rendered on the admissions of the answer alone of the garnishee. On the next day, July 24th, a motion was filed by the garnishee to set aside the judgment and grant a new trial as follows:

"Comes now Drury Laffoon, garnishee in the above entitled cause, and moves the court to set aside the judgment rendered against him in the above entitled cause and grant a new trial for the following reasons: 1st, Because the verdict and judgment are against the evidence, and the weight of the evidence. 2nd, That the verdict and

judgment are against the law and the evidence. 3rd, That upon the answer of said garnishee to interrogatories propounded to him, said plaintiff was not entitled to the judgment rendered against said garnishee, and said answer was not denied by said plaintiff. 4th, That in the answer of said garnishee filed herein on the 19th day of July, 1878, occurs a mistake in the name of the payee of the notes therein mentioned and attempted to be described; that said garnishee did not in fact execute two notes to said Daniel Hibler as therein stated, nor did he at any time execute any note whatever to said Daniel Hibler; that said garnishee on the 19th day of July, 1878, did execute and deliver to Samuel Hibler two promissory notes; one for $500, due the 1st day of March, 1878; the other for the sum of $600, payable on or before the 1st day of May, 1879; that the same were given for the purchase money of real estate, and both secured by deed of trust on real estate, dated the 19th day of February, 1878, and recorded at page 397, in book 22 in the office of the recorder of deeds in and for Cass county, but that said garnishee never at any time executed to said Daniel Hibler a promissory note or promissory notes as stated in said answer; that said answer was made under the impression and belief on the part of said garnishee that said promissory notes herein described (and in said answer attempted to be described), had been executed to said Daniel Hibler, that said answer is incorrect in stating the name of the payee in the notes, and was made under mistake as to the name of payee therein; that said notes were made payable to Samuel Hibler and not Daniel Hibler, and that both said notes are fully paid off and discharged, and that said garnishee did not discover said mistake in said answer until the 23rd day of July, 1879, and after the rendition of said judgment, wherefore he prays that the same may be set aside." This motion was duly verified.

It will be observed that when the garnishee filed his answer, he had already paid the first note, and presumably

had it in his possession. If he did, he or his counsel was guilty of great negligence in drafting his answer, in stating that the notes were payable to *Daniel* Hibler, instead of *Samuel* Hibler. And the same line of remark is applicable if the note was destroyed on payment, for still, in the same county the deed of trust, given to secure the notes, was recorded in March, 1878, and the dictates of ordinary prudence, would have suggested the examination of the deed in order to prepare the answer. And in May, 1879, the second note was paid, over two months prior to the judgment rendered. The garnishee, as we must presume, knew, or else he was guilty of laches which the courts will not aid, when he paid off the second note, to whom it was payable; to whom he paid it; to whom it had been transferred, and what he had alleged in his answer concerning it, both that it was unpaid, and that as to its ownership he could not say; and yet he pays off the note, takes it up, and still leaves his answer in the same shape it was, till judgment was rendered, and properly rendered on his own sworn admissions, when suddenly he discovers, on the very day the judgment was rendered, that he had made a mistake in his answer. If a party showing such an entire lack of even the minimum of diligence, can successfully move to have the judgment against him set aside, it is difficult to conceive of a case where he could not be likewise successful. It was the clear duty of Laffoon, so soon as he paid the second note, to have taken steps to have amended his answer, when the next term of the court was held, when he could have stated the fact of the payment of that note; to whom it had been assigned, and when the assignment occurred.

IV.

A party who by mistake of his attorney pleads a plea which does not cover his defense, or correctly present his case, cannot, after judgment against him on his own admissions, set the verdict aside, and obtain leave to amend

his plea. *McNeish v. Stewart*, 7 Cow. 474. And there are no more favors to be shown in this regard to a garnishee than to any one else. He stands upon the same footing, and must pay the same penalty for his negligence, inadvertence or forgetfulness as any other defendant whatsoever. Thus, where a garnishee answered denying indebtedness, and cause changed to another county, where the plaintiff filed a replication to the answer taking issues thereon, of which no notice was given the garnishee, and upon trial a verdict was found against him, the court refused to set it aside, holding it the duty of the garnishee to follow the case, and to take notice of what was done in it, the same as any other party. *Chase v. Foster*, 9 Iowa 429; Drake on Attach., § 658, and cases cited. So much for this branch of the case.

V.

But the setting aside of the verdict and the granting of a new trial was erroneous for additional reasons: The answer of the garnishee was a sufficient admission of indebtedness to Daniel Hibler to authorize the judgment which was rendered. Nothing to the contrary appearing, we shall presume that the notes given by the garnishee were non-negotiable notes, and that the ownership of the notes remained as stated in the answer, and this in accord with a familiar principle. If the garnishee had been desirous of having determined whether the second note had been assigned to a third person, he should, availing himself of the provisions of section 2541, have disclosed in his answer and declared his belief that the note had been assigned to a third person, naming him, when proper steps could have been taken as provided by that section. But this he did not do, and his loose allusions to the ownership of the note did not comply with statutory requirements.

Therefore, judgment reversed and cause remanded with directions to proceed as herein indicated. HOUGH, C. J., and HENRY, J., concur; NORTON and RAY, JJ., dissent.

ELY v. THE ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, *Appellant.*

1. **Practice**: INSTRUCTIONS MUST RELATE TO THE PLEADINGS: RAILROAD. It is a fatal error to submit to the jury by instruction a case not made in the pleadings. Hence, where the petition in an action against a railroad company for personal injuries alleged as the ground of plaintiff's claim, negligence on the part of the company in running its train over a portion of its track which had been undermined and rendered dangerous by a flood of water; and the court upon the trial gave an instruction which permitted a recovery for defects in the road-bed or in the ties or materials used on the road. *Held*, that the judgment must be reversed.

2. **Railroads**: SUBSEQUENT FACTS NOT TO BE CONSIDERED BY THE JURY. In an action against a railroad company for injuries sustained by a passenger in an accident caused by an embankment on the company's road being undermined by a rain-storm of unprecedented violence, it appearing that since the accident the embankment had been so altered as to provide against a recurrence of such storms, the company asked, but the trial court refused, an instruction that the jury were not to take this fact into consideration. *Held*, that this was error.

Appeal from Livingston Circuit Court.—HON. E. J. BROADDUS, Judge.

REVERSED.

Chas. A. Winslow with *Wells H. Blodgett* and *Prosser Ray* for appellant.

Hale & Son for respondent.

NORTON, J.—This is an action for personal injuries to Josephine Ely, commenced in the circuit court of Carroll county, and moved by change of venue to Livingston, where upon a trial of the cause plaintiffs obtained judgment, from which defendant has appealed.

Omitting the formal parts of the petition, after alleging that said Josephine Ely was a passenger on defendant's train, it avers as the cause of action the following: That

at a point in Chariton county on defendant's road near Salisbury, there had been, on the evening of September 5th, aforesaid, a flood in the water courses along the line of said road, which had undermined and weakened the road-bed, bridges and culverts on said road, whereby the same was rendered unsafe and dangerous for the passage of trains; that notwithstanding the condition of said road, defendant, by its servants, agents and employes, negligently and carelessly attempted to run the train, on which said Josephine had taken passage, over that part of said road which had been so rendered unsafe and dangerous; and when said train reached that part of said road, by reason of said injury to the track, culverts and bridges aforesaid, and the negligence and carelessness of defendant as aforesaid, and the giving away of the embankments, culverts and bridges as aforesaid, said train was thrown from the track, overturned and demolished, including the car in which said Josephine was riding; and that said Josephine was thereby, and by reason of the facts and acts aforesaid, greatly wounded, bruised and injured, and suffered severe pain in body and mind, and was made and is sick and sore and suffered severely, and has sustained lasting and permanent injury, for which damages in the sum of $20,000 is asked.

Among other errors assigned by defendant is the action of the court in giving the following instruction: 4. It was the duty of the defendant to provide a road adapted to the safe passage of the trains over it; and if the jury believe from the evidence that there was any defect in the construction of the road-bed, or in the character of the ties or other material then in use on said road, which defect might have been discovered by the exercise of the care, caution, prudence, skill and foresight indicated in the first instruction, and which alleged defect contributed in whole or in part to the alleged accident, and the plaintiff was injured thereby, then they will find for the plaintiff.

1. PRACTICE: instructions must relate to the pleadings: railroad.

This instruction is excepted to on the ground that it authorized the jury to find a verdict on a cause of action not stated in the petition, and we are of the opinion that the exception is well taken. It will be observed that after the declaration of a correct abstract principle, viz: "that it was the duty of defendant to provide a road adapted to the safe passage of trains over it," the instruction predicates a right of recovery on a case not made by the petition, in this, that it tells the jury to find for plaintiff if they believed there was any defect in the construction of the road-bed or in the character of the ties or other materials then in use on said road, which defect contributed in whole or in part to the accident and injury to plaintiff. No such case as is made by the instruction is made in the petition. The cause of action stated in the petition is not for any defect in the construction of the road-bed, nor in the ties or materials used on said road, but the injury for which plaintiffs sue is alleged to have been occasioned by the negligence of defendant's servants in running its train over the road at a point near Salisbury, where, it is averred, it had been rendered dangerous and unsafe by a flood of water, which, on the night of the accident, had undermined and weakened the road-bed, bridges and culverts. Plaintiffs, in their petition, base their right to recover for negligence in running its trains over a portion of the road rendered dangerous by reason of having been undermined by a flood of water, while the instruction authorizes a recovery for an injury arising out of defective construction or defective ties or materials used on said road, and under the rulings of this court in the cases of *Waldhier v. Hannibal & St. Jo. R. R. Co.*, 71 Mo. 514; *Price v. St. Louis, K. C. & N. R'y Co.*, 72 Mo. 414; *Edens v. Hannibal & St. Jo. R. R. Co.*, 72 Mo. 212, and *Bullene v. Smith*, 73 Mo. 151, it is reversible error to submit to the jury by an instruction a case not made in the petition.

It is also insisted that the court erred in refusing the following instruction on the part of defendant: 12. It

2. RAILROADS: subsequent facts not to be considered by the jury.

was the duty of the defendant, after the rainstorm which occasioned the disaster at its embankment near Salisbury in September, 1876, to so change or alter said embankment as to provide against a recurrence of similar storms; and if it appears from the testimony that defendant caused said embankment to be altered or changed for such purpose, such testimony should not be taken into consideration in this case by the jury in determining whether said embankment was properly constructed and sufficient to withstand and turn back, and had withstood and turned back, all floods that had occurred since the construction of the road, or that might reasonably, within the experience of those living in that locality, be expected to occur.

It appears from the evidence in this case that the rainstorm on the night of the disaster was wholly unprecedented in violence and the quantity of water which fell during its continuance, and was on that account of such a character that defendant in the construction of its road-bed was not required to anticipate or provide against it, and if after the occurrence defendant, out of abundant caution, altered its road-bed so as to provide against injury from the recurrence of such a storm, which might or not again occur, such fact was not a proper one to be taken into consideration by the jury, in determining the question whether the embankment at the point of the accident was sufficient to withstand and turn back all floods that had occurred since its construction, or that might reasonably, within the experience of those living in that locality, be expected to occur. We are of the opinion that the instruction should have been given, since evidence was received to the effect "that after the accident a new pile bridge had been built where the old one was."

It is also insisted that the court erred in submitting the question of negligence to the jury because there was no evidence of it. The case of *Ellet v. St. Louis, K. C. & N. R'y Co.*, 76 Mo. 518, was a suit for the recovery of dam-

ages occasioned by the same accident, and the evidence, which is clearly and accurately set forth in the opinion, is substantially the same as in the case now before us, and the identical question here presented was there considered, and it was held that no error was committed in that respect. Judge HOUGH, speaking for the court: "If the engineer had reason to believe that the water had been higher than it was when he reached the pond, or that it had remained at the height at which he saw it, long enough to soften the earth upon which the ties rested, which, according to the testimony of the experts, would have been an hour or an hour and a half, then although the ties were in place and the rails in line, it would have been his duty to have inspected or tested the track before venturing over it with his train. On the other hand, if the engineer had no reason to believe that the water had been higher than he saw it, or that it had remained where it was long enough to soften the earth under the ties, and he saw the ties in place and rails in line, then, according to the testimony of all the experts, he was not guilty of negligence in attempting to take his train over the embankment. This is a question of fact for the jury."

The case in all other respects, except those above noted, seems to have been well tried, but for the errors herein pointed out the judgment will be reversed and the cause remanded, in which all concur, except RAY, J., not sitting.

CHAPMAN, *Appellant*, v. MCILWRATH.

1. **Equity**: PRACTICE. In equity cases the Supreme Court will defer to some extent to the trial courts in their findings on matters of fact.
2. **Presumption of Honesty**. Where a transaction is as compatible with honesty as with dishonesty, it will be presumed to be honest.

3. **Insurance Policy**: ASSIGNMENT. A parol assignment of a policy accompanied by delivery will vest in the assignee an equitable right, at least, to the proceeds.

4. ——: ——: HUSBAND AND WIFE. A husband may make such a transfer to his wife.

5. ——: ——: ——. As against creditors such a transfer to a wife will be valid, though made without consideration, if it is no more than a reasonable provision for her, unless it was made with intent to defraud the creditors.

Appeal from Livingston Circuit Court.—HON. E. J. BROADDUS, Judge.

AFFIRMED.

On the 9th day of December, 1869, Michael L. McGuire, being then free from debt and contemplating marriage, took out a policy of insurance on his life, payable in twenty years, or sooner if he should sooner die, to himself, his executors, administrators or assigns. On the 20th day of February, 1870, he married and immediately thereafter delivered the policy to his wife, to be her exclusive property as she alleged. She retained the policy, and received and kept the receipts for premiums paid from time to time, until the death of her husband on the 15th day of March, 1873, shortly after which she delivered the policy to the defendant, McIlwrath, who had been appointed administrator of McGuire's estate. McIlwrath collected the policy, used a portion of the proceeds to pay debts of the estate, and in his accounts as administrator charged himself with the balance as assets of the estate. He afterward applied to the probate court for a credit for this balance, alleging that it was the money of Mrs. McGuire, and not of the estate. On the proofs produced the court granted the application. On the 16th day of July, 1875, he made final settlement.

At the time of his death McGuire was surety on the bond of Wm. W. Walden, as guardian and curator of the plaintiff Chapman. McGuire had signed this bond on the

20th day of July, 1871. On the 21st day of October, 1873, Walden made a settlement of his accounts as curator, by which it appeared that he was indebted to his ward. This indebtedness was never paid, and Walden and the other surety on his bond being insolvent, plaintiff brought this suit, as a creditor of the estate of McGuire, to set aside the final settlement of that estate on the ground of fraud. Defendant had judgment and plaintiff appealed.

James M. Davis and *Lewis A. Chapman* for appellant.

B. B. Gill and *A. S. Harris*, for respondent.

RAY, J.—The pleadings in this case were as follows:

The petition states that on the 20th day of July, 1871, one William W. Walden was appointed, qualified and gave bond as the guardian and curator of appellant, who was and continued to be a minor until the 1st day of September, 1874; that said Walden gave bond as such guardian and curator in the sum of $1,200, with the condition that said Walden would faithfully discharge his duties as such guardian and curator; that the sureties on said bond were one John D. Sherman and the said Michael L. McGuire, deceased; that on the 21st day of October, 1873, said Walden, as such guardian and curator, made his first and only settlement in the probate court of Livingston county, by which it appeared that said Walden had of appellant's estate the sum of $592.87 of the date of July 24th, 1872; that on the 15th day of March, 1873, the said Michael L. McGuire died, and the respondent William McIlwrath was appointed and qualified as the administrator of said McGuire's estate; that respondent took charge of said estate, and on the 29th day of April, 1874, he made his first annual settlement, on which settlement he charged himself as such administrator with $4,648 as the proceeds of a certain insurance policy on the life of his intestate. By said settlement respondent admitted that he had in his hands as

such administrator, the sum of $3,666.65; that afterward, about the 15th day of February, 1875, respondent secretly appeared in the probate court and made affidavit that said life policy was intended to be for the benefit of said Michael L. McGuire's widow; that at said time the said widow of said deceased McGuire was a near relative of respondent, and that said respondent was acting in said matter as the attorney and agent of said widow; that respondent knowingly and fraudulently, represented to said probate court, that said sum of $4,648, proceeds of said life insurance policy, did not belong to said estate, but to the said widow, which representation was in conflict with his sworn inventory and first settlement, and was false; that said representation was made for the purpose of benefiting said respondent's relative and defrauding plaintiff out of the amount due by said Walden, and for which said estate was bound, and the whole of which amount due appellant said estate would have to pay, as said Walden and John D. Sherman were totally insolvent; that after said respondent, as administrator of said estate, had inventoried and charged himself with the proceeds of said life insurance policy, he paid debts against the estate of said deceased McGuire to the amount of $1,000, and paid them all out of the proceeds of said life insurance policy; that the probate court, believing the representations to be true, ordered that respondent have credit for said money so received from the insurance on said life policy; and on the 16th day of July, 1875, defendant made final settlement and was discharged; that he did this while the appellant had a suit pending in the circuit court of Livingston county, Missouri, on said bond, and of which suit respondent had notice; that said suit on the bond was dismissed because the circuit court had no jurisdiction, and appellant commenced this suit; that said policy was made payable to said Michael L. McGuire, and his legal representatives, and that respondent, as administrator, rightfully received the proceeds; that without the proceeds of said policy the assets of said estate

were insufficient to pay the claims against said estate in the first, second and third classes; that respondent's action in the matter was intended to defraud appellant.

Respondent's answer denies all knowledge or information sufficient to form a belief as to guardianship or curatorship of said Walden, or that he ever gave bond or made settlement; denies that he ever appeared in the said probate court, or ever secretly transacted any business, but alleges that all his conduct as administrator and all of his statements as such were open and fair, and that his final settlement and discharge as such administrator were made with and by said court and said court was fully advised of all the facts affecting the title to said policy, and of all the acts and transactions of the respondent as such administrator; that the said policy of insurance was effected by the said M. L. McGuire while he and Mary McGuire (his widow) were engaged to be married to each other, and that the object and purpose of said Michael in effecting such policy was, and he so stated to the said Mary during their engagement, to provide for her as his intended wife a suitable fund for her support and maintenance as his wife and widow in case she should survive him, said fund to be held by her for her sole and separate use; and respondent says that in pursuance of and in order to secure the accomplishment of his aforesaid object and purpose he did, immediately upon his marriage with said Mary, assign by delivery the said policy to her with the intent of investing her, to her sole and separate use, with the exclusive right and title thereto, and to all the proceeds and assets thereof; that on the death of said McGuire, she (Mary McGuire), the widow, placed the said policy in the hands of the respondent for him to collect the proceeds of said policy, and that he received the said policy with the understanding and agreement between them, that as between her and respondent she was the owner of such policy and lawfully entitled to the proceeds thereof; that upon the aforesaid delivery to the said Mary by way of assignment thereof

to her, the right and title thereto vested in her to her sole and separate use, and that since the collection of the money thereon by him, the right and title thereto vested in her to her sole and separate use.

The reply is a denial of each and every material allegation of new matter in the said answer contained.

It will be observed that the object of this suit is to set aside the final settlement of defendant as administrator of the estate of McGuire on the ground of fraud. Defendant was the administrator of McGuire, who was one of the sureties of William W. Walden, who was guardian and curator of plaintiff. The bond of the curator was dated July 20th, 1871. By the first and only annual settlement of said Walden made October 21st, 1873, it is shown that said curator was indebted to his ward in the sum of $592.87.

On the hearing of the cause now before us, the circuit court found in favor of the defendant, and this finding should be conclusive against the plaintiff unless it be made to appear that said finding was not sustained by the evidence. We have examined the evidence carefully, and after such examination find no cause to arrive at any other conclusion than that reached by the trial court. And it is our constant practice to defer, to some extent, at least, to the trial courts in their findings on matters of fact. *Chouteau v. Allen*, 70 Mo. *loc. cit.* 336. If there was no fraud, that must end the case and prevent the final settlement from being set aside. But notwithstanding we fully concur with the trial court in its findings, we think it proper to offer some reason why we regard that finding correct on the question of fraud, and also correct on other grounds.

1. EQUITY: practice.

The alleged fraud is said to consist in these facts, that McIlwrath, the defendant, who, as before stated, was McGuire's administrator, having charged himself in his inventory, as such administrator, with a certain policy of insurance effected on the life of said Mc-

2. PRESUMPTION OF HONESTY.

Guire on December 9th, 1869, afterward went before the probate court and obtained an offset to the amount of said policy, by making an affidavit that the policy was really the property of Mrs. McGuire, the widow of his intestate, and not the property of said intestate. Upon this showing the probate court gave the administrator the credit asked, and thereupon the settlement which is charged to be fraudulent (and which took place after due legal notice) was made. It does not seem to us, that there was anything fraudulent in the administrator taking the course he did. He may have made a mistake in his duties or as to the law of the case; but this should not be laid at his door as fraud, unless upon better grounds than we find in this record. And it is well settled in this State, that where a transaction is as well compatible with honesty as dishonesty, that it shall be presumed to be the former and not the latter. *Dallam v. Renshaw*, 26 Mo. 533.

But we do not think that McIlwrath made any mistake, either in law or fact, in taking the course and making the affidavit he did. It appears in evidence, and there is no controversy on the point, that said McGuire, just before he effected the said policy of insurance on his life, became engaged to be married to Mrs. McGuire, now his widow. After he was thus engaged, he told her he had effected a policy of insurance on his life for her special benefit, in contemplation of marriage. As before stated, this policy was effected December 9th, 1869, and was made payable to said McGuire, his executors, administrators or assigns. Said policy was to be paid December 9th, 1889, or at the death of the insured if he should die before that period. Immediately after the marriage occurred, which took place February 20th, 1870, the said McGuire delivered the policy of insurance to his then wife, saying to her that it was his intention, by delivering the policy to her, to invest her with the title to said policy, to her own sole, separate and exclusive use; and with the sole right to the proceeds thereof, as a means of support in case of his death

and her widowhood. After the policy was delivered to Mrs. McGuire, she kept it in her exclusive control and possession, as well as the receipts for the premiums paid from time to time, until the death of her husband, when she delivered them to McIlwrath, the administrator and defendant.

3. INSURANCE POLICY: assignment.

The policy of insurance on the life of said McGuire, was assignable by parol, and by mere delivery, if such was the intention of the said McGuire; and of this intention there can be no doubt from the evidence. Policies of insurance are choses in action, and like any other choses in action they may be assigned by delivery. *Boeka v. Nuella*, 28 Mo. 180; *Bennett v. Pound*, 28 Mo. 598. No writing is necessary, at least so far as vesting the equitable interest therein is concerned. *St. John v. Am. Mut. Life Ins. Co.*, 13 N. Y. 31. Mr. Phillips states: "Policies are usually assigned in writing: but a merely verbal assignment and delivery of the policy, gives to the assignee an equitable right to the proceeds, where the policy itself contains no provision to the contrary." 1 Phillips on Ins., (4 Ed.) 60, § 80; May on Ins., § 389.

4. ——: ——: husband and wife

It was the original and legitimate purpose of life insurance to provide for the widow and orphans, on the death of those upon whose exertions while living, they depended for support. Reynolds on Life Ins., chap. 1; Ellis on Life and Fire Ins., 99, § 2. And the possession of the policy is *prima facie* evidence of the right to receive the insurance money. Bliss on Life Ins., 546. And, subject to the claims of all creditors to avoid a transfer made in fraud of their rights, any act which indicates an intention to transfer the interest in the policy, whether voluntarily or for a consideration, will be held good, though no possession is given of the policy or notice to the company. Ib., 547. *Prima facie*, the wife's possession is that of the husband, and in equity you may show the wife's equitable ownership, even of a chattel, is the gift of her husband; not considering for the present

the claims of creditors. And there is no doubt that in contemplation of equity, husband and wife can contract with and convey to each other; 1 Bishop on Mar. Women, § 719; *Morrison v. Thistle*, 67 Mo. 597; 2 Story Eq., §§ 1368, 1370; and *Terry v. Wilson*, 63 Mo. 498, recognizes the same doctrine.

In the case before us, the assignment of the policy by the husband to the wife occurred long before the husband signed the bond of Walden, as one of his sureties. At the time of delivering the policy to his wife, it does not appear that McGuire had any existing creditors, and if he did not have, the gift and delivery of the policy, being but a reasonable provision for the wife, could not be avoided by any subsequent creditors without proof of an intent to defraud them at the time the policy was delivered; and McGuire died March 15th, 1873, long before the annual settlement of Walden, which occurred October 21st, 1873.

At the utmost all the plaintiff could claim, under the rule announced in *Pullis v. Robison*, 73 Mo. 201, even if defendant's final settlement be set aside for fraud, would be the amount of the policy produced by premiums paid by McGuire after he became insolvent.

These remarks are of course based on the theory that the assignment of the policy as before stated, was a valid one in equity if not at law, and such assignment is to be treated as if the husband, instead of delivering to his wife, had caused the policy to be issued directly to her, and in this light we feel inclined to regard it. Bliss on Life Ins., (2 Ed.) 544, and cases cited.

For these reasons we must affirm the judgment. All concur, except NORTON, J., who is absent.

WESTLAKE & BUTTON (*a corporation*), *Appellant*, v. THE CITY OF ST. LOUIS.

1. **Payment of Water License under Compulsion.** Payment of a water license under threat of turning off the water in case of continued refusal, is payment under compulsion, and if the charge is excessive, the excess may be recovered; and that without tendering the amount really due.

2. ——: TENDER. Tender of the true amount due for a license is not essential to authorize recovery of the excess paid where it is apparent from the language used, that the tender would not be accepted.

Appeal from St. Louis Court of Appeals.

REVERSED.

This action was brought by Westlake & Button, a corporation, to recover of the city of St. Louis the sum of $1,756.49, the aggregate of overcharges made by the city, as the plaintiff alleged, on water licenses issued to plaintiff. At the trial the plaintiff gave evidence tending to show that in September, 1862, the license for plaintiff's foundry was fixed at $115 per half year; that prior to that time it had been $42; that the new rate was illegal and excessive; that plaintiff objected to it on that ground; that the assessor and collector of water rates refused to make any reduction and threatened to turn off the water from plaintiff's foundry at once if payment was not made; that payment was made to prevent this threat being carried into execution; that like objection was made by plaintiff at each renewal of the license; that in 1873 application was made to the board of water commissioners for a reduction, but they refused relief; that plaintiff, thereupon, refused to pay the overcharge and the board sent down a man to turn off the water from plaintiff's premises; that when he came, in order to prevent the water from being turned off, plaintiff paid the license; that plaintiff's foundry was entirely dependent for its supply of water on the city waterworks,

and that if the water had been turned off plaintiff would have been compelled to close their foundry and thus have suffered a heavy loss. It further appeared that the water never was, in point of fact, turned off; that none of plaintiff's property was ever seized, and none of plaintiff's officers or employes were ever arrested, nor was any threat of seizure or arrest ever made; that no written protest was ever filed by plaintiff; and that after 1873 the license was reduced to the original rate. This was the substance of the plaintiff's evidence. At its conclusion the court, at the request of the defendant, gave an instruction that the plaintiff could not recover. There was judgment for the defendant, which judgment was affirmed by the St. Louis court of appeals, and plaintiff then appealed to this court.

E. McGinnis for plaintiff in error.

In the cases where the law requires a protest at the time of payment to be made, as a condition to the recovery of money not legally due but paid under compulsion, such protest is not required to be in writing unless so prescribed by statute, nor need it be formal. *Swartwout v. Gihon*, 3 How. 110; *Erskine v. Van Arsdale*, 15 Wall. 75. If money is paid under such circumstances to a party for his own use, no protest is necessary in order to lay the foundation of an action for its recovery—protest is necessary only when the action is against an agent who must account to his principal for the money collected. *Meek v. McClure*, 49 Cal. 624; *Swartwout v. Gihon*, 3 How. 110; *Boston Glass Co. v. Boston*, 4 Met. 181; Burroughs on Taxation, p. 266; 18 Alb. L. J. 76. If a party is required by law to take out a license before doing certain acts, or to suffer a penalty or fine for doing such acts without first having procured a license, and is required to pay an illegal and excessive price in order to obtain such license, the payment of such excess is compulsory and may be recovered back. *Morgan v. Palmer*, 2 Barn. &. Cress. 319; *City of Marshal v. Snediker*, 25 Texas

460; *County of La Salle v. Simmons*, 10 Ill. 513; *Baker v. Cincinnati*, 11 Ohio St. 534. When a party is compelled to pay an illegal demand to one armed with apparent authority to enter upon his premises and seize upon his property, without first resorting to an action at law, and the payment is made to prevent the threatened exercise of the authority, such payment is involuntary. Burroughs on Taxation, p. 266; *Wolfe v. Marshal*, 52 Mo. 167; *Preston v. Boston*, 12 Pick. 7; *Allen v. Burlington*, 45 Vt. 202; *Hendy v. Soule* 1 Deady 400: *Claflin v. McDonough*. 33 Mo. 412.

Leverett Bell for defendant in error.

Westlake & Button availed themselves of the water supply of the city. They claimed that they were overcharged for the use thereof. They conceded, however, that they were required by law to pay some amount into the city treasury therefor. They never tendered the amount admitted by them to be due. They protested against paying the sum charged, but did not offer to pay any specific sum. They assumed the position that the city by charging in excess of the rate fixed by law, was required to supply them with water free of charge, or without any payment first made by them. This, the city officials declined to do, and threatened to cut off the supply of water if payment was not made. And payment being made under these circumstances, no recovery thereof can be had. They were not imprisoned; they were not subjected to duress; their property was not seized; they were not coerced. They were informed that they could not be permitted to use the water without payment, and a failure to pay would be followed by severing the water from their premises. This course the city was empowered to pursue, unless some duty rested on it, to furnish them with water without compensation. *Walker v. St. Louis*, 15 Mo. 563; *Christy v. St. Louis*, 20 Mo. 143; *Claflin v. McDonough*, 33 Mo. 412.

SHERWOOD, J.—The instruction in the nature of a demurrer to the evidence should not have been given. The money sought to be recovered was not voluntarily paid. None of the three cases cited by the defendant are analogous to the present one. Two of them follow in the wake of, and were similar in their essential facts to that of *Walker v. City of St. Louis*, 15 Mo. 563. There the party who afterward complained, made no objection; paid the taxes; saw them applied to the improvement and enhancement of the value of the property on which they were levied, and years afterward, for the first time, is the complaint made. Of course this was a mere voluntary payment, and no right to recover any excess existed. But no such case is presented by the present record. Here the parties who paid, objected and protested from the first. They vainly called the attention of the officers appointed to assess and collect the amount of the water license, to the fact that such amount was in excess of that allowed by the ordinance; they in vain appealed to the board of water commissioners. The only answer returned in each instance was, "pay, or we will turn off the water." It is easy to see that in such circumstances the payments were not made voluntarily. They were made under what has been aptly termed "moral duress;" the parties paying the excessive amount, and those receiving it, were not on equal terms. The city officials possessed the power, and they threatened to exercise it, of cutting off the water supply of Westlake & Button, unless the illegal demands already mentioned, met with immediate compliance. If this conditional threat had been carried into execution, the foundry of the applicants for license would have been forthwith closed, and from sixty to one hundred hands thrown out of employment. The payment of the excess was, therefore, as much under compulsion, as if the city officials had been armed with a warrant for the arrest of the person or the seizure of goods, in

which case, but one opinion would be entertained as to the nature of the payment if made.

The case of *Maguire v. The State Savings Association*, 62 Mo. 344, closely resembles, in its salient characteristics, and is decisive of this one. There the collector demanded interest on a personal property tax, an illegal demand, and this demand was coupled with another demand for the personal property tax itself, which was in all respects legal. The Savings Association objected to the payment of the excess, applied in vain to the county court for an abatement of the interest, and then paid the whole sum, and we held, in an action for money had and received, the excess could be recovered, because "the money was unwillingly and compulsively paid; paid to one seemingly clothed with power to seize and sell goods, etc., for the payment of the illegal demand, and paid under fear that such unjust demand would be enforced." If the fear of the seizure of goods in the one case would make the payment of the excess, when made under objection, an involuntary one, certainly a payment made to prevent immediate and incalculable injury to one's business or property, can be regarded in no other light.

And it is idle to say that a tender should have been made of the exact amount due. No such tender was made or deemed necessary in *Maguire's case, supra*, and besides, a tender of a smaller sum than that demanded, is never necessary where it is apparent from the language used, as in this case, that such tender would be a mere nugatory act, and be met with prompt and peremptory refusal to receive the amount if tendered. *Hoyt v. Sprague*, 61 Barb. 497; *Holmes v. Holmes*, 12 Barb. 137. *Deichman v. Deichmann*, 49 Mo. 107

Therefore judgment reversed and cause remanded.

SNYDER v. BURNHAM *et al.*, *Appellants.*

1. **Partnership.** Persons jointly conducting a mining venture are partners, though there is no agreement for a partnership.
2. **This** court will not review the action of the trial court sitting as a trier of fact in a law case.
3. **Motion for New Trial:** NEWLY DISCOVERED EVIDENCE. A motion for a new trial on the ground of newly discovered evidence is properly overruled when the affidavit in support of the motion fails to disclose legal diligence to discover the evidence before trial, or when the evidence is merely cumulative.

Appeal from Dade Circuit Court.

AFFIRMED.

E. J. Smith, *L. W. Shafer* and *D. P. Stratton* for appellant Stevenson.

D. A. DeArmond and *B. G. Thurman* for respondent.

NORTON, J.—This suit was commenced upon an account, in the Dade county circuit court, to recover from defendants the sum of $209.25, and interest, for goods sold and delivered and money paid to defendants and persons in their employ while said defendants, as alleged, were engaged as partners in the mining business. Defendant Burnham made default, and Stevenson answered, denying every material allegation of the petition and each and every item of the account. The cause was tried by the court without the intervention of a jury, and judgment rendered for plaintiffs for the sum of $212.40, from which defendant Stevenson has appealed to this court, and assigns as the chief grounds of error the action of the court in giving and refusing instructions, and also that there was no evidence that defendants were partners.

The evidence tended to show that prior to September 25th, 1876, defendant Burnham and one Van Dreaser had
1. PARTNERSHIP. an interest in a pump-shaft on the land of

the Dade County Mining & Smelting Company, which was being sunk for lead ore; that about the date above mentioned, defendant Stevenson bought the interest of said Van Dreaser in said shaft. Defendant Burnham testified that from the 25th day of September, 1876, to February 27th, 1879, he and Stevenson were partners in running said pump-shaft, that he had no talk with Stevenson about his coming into the shaft and no arrangement was made between them except he said "he had bought out Van Dreaser and would help bear expenses;" and that they were unable to prosecute the work without aid, and that the mining was carried on under the name of Burnham & Co.; that he arranged with plaintiffs to pay the hands in their employ in working said shaft out of the store upon his, Burnham's orders, and that he was to give plaintiffs warrants issued by the Dade County Mining & Smelting Company as advances on mineral, as so much cash for goods furnished as aforesaid; that the account sued on was for goods so furnished and cash in excess of said warrants, and was correct. Stevenson in his evidence admits the purchase on the 28th day of September of Van Dreaser's interest in said pump-shaft; but says that he and Burnham did not begin work on the pump-shaft till the 2nd day of October, 1876; while he worked on the Burnett lot Burnham worked on the pump-shaft. He further stated that they were to furnish two hands on the pump-shaft and the Mining & Smelting Company were to allow them $9 per week for running the engine. The Mining & Smelting Company were to pay the expenses of running the shaft. Burnham told witness from time to time that he was keeping the time of the hands and getting warrants and settling with them. Some of the men complained to witness that they had to go to plaintiffs for pay. Witness told them they could get their pay at the office. Witness further testified: "We were mining for lead under the Mining & Smelting Company. The pump-shaft was regarded as a test, and the company were anxious to have it pushed. We were

not able to bear the entire expense, and the company made these advances to aid us; they were to be repaid by us out of the mineral if we should get any out of the shaft, all except for the services of the engineer." Mr. Taggart, president of the smelting company, testified that he drew up the contract between Stevenson and Van Dreaser on the 28th day of September, 1876; that the mining company furnished the money to sink the shaft; Burnham kept the books, had the management of the business of the pump-shaft, gave the time of the men every Saturday and received the warrants to pay them, which were generally issued in gross. The evidence tended further to show that Stevenson, when notified by plaintiffs of the account and that he would be looked to for payment, requested it to be made out, and when Snyder, the collector for plaintiffs, told him they wanted it paid, giving him the amount of it, he said he knew there was an account but did not think it was so large.

In the light of this evidence we are enabled to see that defendants were engaged in the enterprise of sinking a shaft for the purpose of obtaining lead ore, that it could not be carried on without laborers, that these laborers were employed, that being unable to meet the expenses thus incurred in the prosecution of the business it was arranged by Burnham with plaintiffs that they should pay the hands employed out of their store on his orders, and that Burnham was to turn over to them the warrants or checks issued by the Mining & Smelting Company as an advance on mineral prospectively to be raised out of said shaft, as so much cash in payment of the amounts so furnished the hands, and that the Mining & Smelting Company were to be repaid or re-imbursed for such advancements out of the mineral which might be taken out of said shaft by Burnham & Stevenson. In view of this evidence we are of the opinion that the objection made that there is no evidence of partnership, is not well taken.

In the case of *Duryea v. Burt*, 28 Cal. 569, it was held

that if two or more persons acquire a mining claim for the purpose of working the same and extracting the mineral therefrom, and actually engage in working the same, and share according to the interest of each the profit and loss, the partnership relation subsists between them, although there is no express agreement to become partners, or to share in the profits and losses. So in Rockwell on Mines, p. 578, it is said: "It may be concluded that when persons acquire interest in lands apparently for the sole purpose of working the mines in them, they must be considered as entering into a commercial partnership." 3 Kent 42. It follows from the above, when applied to the facts of this case, that the partnership relation existed between defendants in mining in said pump-shaft. The court gave instructions for plaintiffs embracing this theory of the case, and refused counter instructions offered by defendants, and in so doing did not err.

It is not necessary to discuss the question raised in the brief of counsel as to whether one partner in a mining partnership can bind his co-partner by issuing bills of exchange or negotiable notes in the name of the firm, inasmuch as no such question is presented in the facts in this record.

One item of the account sued on is for $60 cash, and it appears from the evidence of Burnham that this money was expended in the purchase of a note for lumber, the balance on which amounted to $70, and that the note was purchased with the consent of Stevenson, and the lumber used in the shaft. Stevenson contradicted Burnham in this respect, and we will not undertake to decide between them, that being the province of the trial court sitting in this case as a jury.

It was also alleged in the motion for new trial sustained by affidavit, that since the trial defendants had discovered material evidence. The court did not err in overruling the motion on this ground, as the affidavit did not disclose legal diligence on defendants'

3. MOTION FOR NEW TRIAL: newly discovered evidence.

part to discover the evidence before trial, and as the evidence was merely cumulative. *State v. Ray*, 53 Mo 345.

Judgment affirmed, in which all concur.

THE TOWN OF WARRENSBURG *ex rel.* COLBERN, *Appellant*, v. MILLER.

1. **Officer**: TRESPASS: LEGAL PROCESS. In order that an officer may justify under process, it is essential that jurisdiction be possessed by the court or tribunal from which the process emanates, and that it be fair on its face.

2. **Case Adjudged**: ILLEGAL ASSESSMENT AND LEVY OF TAXES: LIABILITY OF COLLECTOR. The charter of a town provided for the levying of taxes by ordinance of the council, the rate not to exceed one-half of one per cent. An ordinance made it the duty of the assessor to make the assessment after the 1st day of May in each year, and provided that his valuation could be corrected by the council on the appeal of a tax-payer, and further, that the tax-book should be returned to the council, to remain for the inspection of all persons interested; that thereafter the clerk should transfer to a "delinquent tax-book" the lots on which taxes were unpaid, and that by the delinquent tax-book the collector should be authorized to seize and sell property. In the present case the assessment was made in April; at a meeting of the council the valuation of the property of a tax-payer, who did not appeal, was increased, and by this increase his tax was made to exceed the legal rate on the assessor's valuation; the tax was then levied by a resolution of the council; the original tax-book was not returned to the council, nor a delinquent book prepared, but by resolution the council ordered that the original tax-book be turned over to the collector as the delinquent tax-book, and this was done. The collector having seized and sold the property of the above mentioned tax-payer to satisfy the tax so levied, he brought this action on the collector's bond. *Held*, that the council had no jurisdiction to make the levy by resolution; that the substitution of the original for the delinquent tax-book was illegal; that as process it was void, and that the collector was bound to take notice of the defects, and was liable as a trespasser for his proceedings under it.

3. **Action at Law**: JURISDICTION: EQUITY. A court of equity will prevent a threatened injury where the remedy at law is inadequate.

But failure to invoke this remedy is no bar to an action at law for the injury actually done. Per SHERWOOD, J.

4. **The cases of** *Rubey v. Shain*, 54 Mo. 207, and *Ranney v. Bader*, 67 Mo. 476, criticised by SHERWOOD, J.

Appeal from Johnson Circuit Court.—HON. W. S. SHIRK, Judge.

REVERSED.

Philips & Jackson for appellant.

J. J. Cockrell for respondents.

SHERWOOD, J.—Action on the bond of defendant, who was town marshal and *ex-officio* collector of the town of Warrensburg. The breach assigned is the wrongful seizure and sale by the defendant under color of his office of the personal property of the relator. The sale of the property being admitted, the controlling question in the case is whether by reason of the circumstances detailed in evidence, any liability on the part of the defendant has been incurred.

In order that an officer may justify under process it is essential that jurisdiction be possessed by the court or tribunal from which that process emanates, and that such process be fair on its face. In the case at bar was the process fair on its face, and did the council have jurisdiction? If these questions be answered in the negative the liability of the officer must be deemed established. To determine how these questions should be answered we will examine the facts in the case and the charter and ordinance of the town of Warrensburg.

The town clerk and *ex-officio* town assessor had assessed the property of the town and returned the assessment and list to the mayor on the 1st day of May, 1874. This assessment was made in April, 1874; when by the terms of the ordinance the town clerk was not to make the assessment

until "after the 1st day of May in each and every year;" so that the initial step in the premises was contrary to law. There were some few appeals taken from this assessment, but relator did not appeal. The council gave notice to the inhabitants of the return of the lists and held a meeting to hear and decide "all appeals of those aggrieved." Notwithstanding the relator did not appeal the council at such meeting not only increased the total valuation of the town property to some extent, but increased the valuation of relator's property more than two fold. This was clearly beyond the power of the council. They only possess the power of correcting the assessor's list when an appeal is taken and not otherwise. Nor did they obey the organic law of their municipality, to-wit: their charter, when they by resolution extended the taxes on the list thus corrected by them and ordered such taxes to be levied, etc., because that charter only conferred power on them to levy and collect taxes by ordinance. The resolution was, therefore, a nullity.

But these proceedings of the council in contrariety of charter and ordinances did not stop with this unauthorized resolution. On the first day in October in each year, section 13, ch. 3, art. 2 of the ordinances requires that the tax-book be returned to the city council and that "such tax-book shall thereafter remain on file in the office of the clerk of the town for the inspection of all persons interested." Within twenty days after the return of the original tax-book it is made the duty of the clerk to transfer to a book to be known as the "delinquent tax-book," the lands and lots upon which the taxes remain unpaid. "The collector, by virtue of such delinquent tax-book," was authorized to seize and sell personal property. The original tax-book, however, was never returned and delivered to the town clerk as required by law. But on the 4th day of November, 1874, the council, by another resolution, ordered that the original tax-book "be turned over as the delinquent book for 1874, to J. K. Miller, marshal and *ex-officio* col-

lector, and that he receipt for the same," and it was by virtue of this, the original tax-book, that the seizure and sale were made.

It is quite plain from the foregoing brief recital of facts and reference to the charter and ordinances of the town of Warrensburg, that the seizure and sale of relator's property were altogether unwarranted by law. If the town clerk can anticipate by one month the day of assessment pointed out in the ordinance then might he do so for a much longer period. As the assessment is the only valid foundation for all the proceedings which follow it, "it is, therefore, not only indispensable, but in making it, the provisions of the statute, under which it is to be made, must be observed with particularity." Cooley Tax., 260. If the town council can, in direct violation of their charter, levy taxes in any other method than that provided, by ordinance, then the charter possesses no binding or obligatory force. If the town council can, in contravention of its own ordinance, correct the assessment list prepared by the town assessor and increase the valuation of the property when no appeal is taken from such assessment, then the ordinance is of no avail as a rule of municipal action. Similar observations are equally pertinent as to the resolution commanding that the original tax-book be turned over to the marshal as the "delinquent tax-book." In no circumstances does the ordinance allow the original tax-book to be used as the execution process. The ordinance having provided that the "delinquent tax-book" should authorize the collector to seize and sell personal property, every other method of proceeding was obviously excluded. *Alexander v. Helber*, 35 Mo. 334. And the defect was apparent on the face of the original tax-book, and the collector to whom it was delivered was bound to know the law, and that he was acting under void process and at his peril. *State v. Shacklett*, 37 Mo. 280. And the resolution of the council ordering that the collector use the original tax-book as the "delinquent tax-book," does not help the

matter nor better the collector's plight. The council could not by a resolution violate their own municipal law. No more could they authorize any one else to do so.

The principle announced in cases of this sort is, that "whatever the statute provides for in this regard the collector must have; and he is a trespasser, if he proceeds to compulsory action without it." Cooley on Tax., 292, and cases cited. Under the ordinance the "delinquent tax-book" is but another name for a warrant, such as is usually employed in tax collections and sales, and is, therefore, to be governed by similar rules. Where a warrant issues "it must conform to the law authorizing it and be issued by the proper person designated by law, or it is no protection to a collector." Ib. In the present instance, not only was there an entire lack of legal process, but even that which was unwarrantably substituted therefor was not issued by that officer who alone possessed authority to issue legitimate process.

If a circuit court, being possessed of jurisdiction over person and subject matter, should order that the amount recovered by its judgment be indorsed on the writ of summons, and that this writ be used by the sheriff as a *fieri facias*, no one would contend that such order and such summons would be any protection to the officer; and yet the circuit court in the hypothetical case would have had jurisdiction down to the time of the recovery of judgment, but none whatever to authorize the issuance of the anomalous writ. If the order of the circuit court in the case instanced, would afford no protection to the officer, surely none was afforded in the case under discussion. So that, though it be conceded that jurisdiction over the subject matter existed in the council, this concession, under the principles stated and the authorities cited, would not save the collector from occupying the predicament of a trespasser. But the council, as already stated, had no authority to levy a tax by resolution, or to correct the assessment made by the town assessor, except when an appeal was

taken from such assessment, and no authority to levy, even by ordinance, a tax exceeding one-half of one per cent for town purposes. The effect, therefore, of the unwarranted increase in the valuation of relator's property, was to increase his taxes to three per cent. These being the facts in this case, it cannot be affirmed that jurisdiction of the subject matter existed, or even if it did, that it would justify the excessive taxation. And it was for the purpose of collecting this excessive tax, which caused the wrongful act which forms the basis of this suit.

For the foregoing reasons both of the questions propounded at the outset, must meet with negative replies, and of consequence the collector be held liable. Therefore judgment reversed and cause remanded.

My associates concur in reversing the judgment, on the ground that the execution process not being in compliance with the charter and ordinances, was no protection to the officer. I have some additional views which I will present in a separate opinion.

Separate Opinion.

SHERWOOD, J.—Of the liability of the collector on any of the grounds stated in the foregoing opinion, I entertain no manner of doubt. This was the doctrine constantly asserted by this court until a comparatively recent period. The principle enunciated being briefly this: That void things are no things; that a void authority is the same as none at all. *State v. Shacklett, supra.* In the early case of *Deane v. Todd*, 22 Mo. 90, Judge Leonard, speaking for the court, said: "If the assessment against the plaintiff could be considered a nullity, conferring no authority on the assessor to sell the personal property of the plaintiff, the remedy of the party would be to sue the officer for the trespass and disregard the pretended title of the purchaser." In *Sayre v. Tompkins*, 23 Mo. 443, the same learned judge, who was well grounded in the fundament-

als, as well as the higher branches of the law, said: "The relief here sought is to restrain the defendant from selling the plaintiff's personal property under an assessment of school taxes, made by the proper school district authorities. This is not a proper case for equitable relief. If the assessment be void, as alleged, it will not protect the officer, nor will a sale divest the plaintiff of his property. The wrong can be fully compensated for at law. It is not in any sense an irreparable injury, and no reason exists for transferring the jurisdiction in such cases from law to equity. There is as yet no authority of this court, that we are aware of, to warrant this relief, and we are not disposed to make one by sanctioning the present proceeding." In *Bank v. Meredith*, 44 Mo. 500, Judge Bliss, speaking for this court, said: "There is no equity in this petition for two reasons: first, it is well settled that an injunction to restrain the collection of taxes is not the proper remedy for an illegal or irregular tax, unless the sale of the property is accompanied by such circumstances that it will work irreparable mischief, or, in the language of the statute, when an adequate remedy cannot be afforded by an action for damages. It is unnecessary to cite the numerous authorities in England and in other states, and I will only refer to the following from our own reports," etc., etc. This doctrine was reiterated again and again by this court, and was never doubted or denied either in this court or elsewhere, until the case of *Rubey v. Shain*, 54 Mo. 207, arose. When that case first came here, 51 Mo. 116, the appeal was dismissed because no final judgment was entered. But it was held that the petition stated a cause of action and that the "defendants should have answered to the merits instead of demurring." On the return of that cause, however, a different view was taken of the law and the petition held to state no cause of action. That case is on all-fours with this one, with the single exception that there no sale of the personal property levied on actually occurred. This court held that the tax was illegal and

void, but that no recovery could be had against the officer; that plaintiff's only measure of relief was to obtain an injunction to arrest the execution of the illegal subscription or other order of the county court upon which the void tax complained of was based, and that if the tax-payer failed thus to employ preventive measures he was thenceforth remediless.

The doctrine is a familiar one that a court of equity will interpose to prevent a threatened injury where the remedy by law is inadequate. But the doctrine is by no means familiar that if you fail to invoke equitable relief to thwart threatened danger that such failure on your part ousts the jurisdiction of a court of law, to give redress for the injury when actually done. It would seem at first blush that if the impending injury were sufficiently great to authorize equity in the first instance to prevent it, that *a fortiori*, a court of law should grant redress for such injury when fully consummated. This court has held that if a party, by "moral duress," by illegal exaction, by a threat to sell personal property, be compelled to pay a sum of money to a collector, that such sum could be recovered in an action for money had and received. *Maguire v. State Savings Asso'n*, 62 Mo. 344. That case was unanimously approved by this court in the case of *Westlake v. St. Louis*, *ante*, p. 47.

If an action at law of the description just mentioned can be maintained where the trespass, the illegal act, is merely threatened, assuredly an action ought to lie when that threat finds actual consummation. Speaking for myself, therefore, I perceive no sound reason why the doctrine of *Rubey's case* should be any longer followed.

The case of *Ranney v. Bader* is relied on as supporting the judgment rendered by the lower court. The action in that case was for the recovery of money collected by means of an illegal, unconstitutional and void tax on the real estate of the plaintiff, whereby he was coerced to pay the sum thus illegally levied. The tax was adjudged by this

court to be as plaintiff claimed, but on the authority of *Rubey v. Shain*, *supra*, it was held that no action would lie for the recovery of the sum thus illegally exacted. A case whereby money is extorsively obtained by the levy or threat to levy on personal property for the purpose of collecting an illegal and void tax, is not, as I conceive, distinguishable in principle from one where a precisely similar illegal exaction takes place by the levy of the same tax on real property. It is true that in the latter case equity will sometimes interfere by injunction, and never in the former save in exceptional instances. But the fact that equity interferes to prevent injury being done, does not oust the jurisdiction of a court of law to give damages for the injuries when done. Speaking for myself then, I am of the opinion that the money extorsively obtained in *Ranney v. Bader* should have been recovered as well in that as in *Maguire's case*, *supra*, since it can scarcely be held to be in consonance with either reason or justice that the protection of the officers should proceed not from the nature of the process he holds, but from the nature of the property whereon he levies.

POMEROY, *Appellant*, v. BENTON.*

1. **Practice**: REMANDING WITH SPECIAL DIRECTIONS TO TRIAL COURT. When on hearing a cause in the Supreme Court a defendant is found to be a fraudulent trustee; and the cause is remanded with instructions to require him to account as such; the sole duty of the circuit court, or its referee, is to comply with the mandate; and neither the law or the fact adjudged by the Supreme Court can be re-tried below.

2. **Fraud, must be Proven.** When a plaintiff seeks relief against a contract on the ground of fraud, his action can only be maintained by proof of the fraud alleged. A finding that defendant is innocent of the fraud, followed by a judgment against him of $15,350.60⅔, is

*The reporter is indebted to Judge SHERWOOD for the syllabus and statement of this case.

erroneous. If there was no fraud in any of the ways charged, that was the end of the matter.

3. **Depositions.** The deposition of a defendant taken in the cause may be read in evidence by plaintiff if relevant as an admission of defendant, though he is present and willing to testify.

4. **Right to Adduce Evidence.** The plaintiff being on the witness stand offered to testify in his own behalf that he had never used the money of the firm for his private benefit; but the referee refused to allow him. It was error in the referee afterward to report that the plaintiff had so used the money of the firm.

5. **Referee's Report.** The report of a referee need not be approved in express terms. If exceptions are filed to the report and overruled, that is a sufficient approval of the report.

6. **A case of Fraud by a Trustee.** The testimony in the record strongly tends to show that: defendant deceived and misled the plaintiff's decedent by imposing upon him a false balance sheet of the business of the firm; that he fabricated the check of $5,421.16 put in evidence by him, in connection with his purchase of whisky through Bowen & Co.; that after commencement of the suit he destroyed a book in which he kept the account of his whisky transactions to cut off investigation, and refused when examined as a witness to furnish information which he must have possessed touching said transactions, pretending he did not know and could not remember what reasonably he ought to have known and remembered. It belongs to a trustee charged with a breach of trust to explain and make clear whatever is uncertain or complicated in the matter. He should distinctly draw the line which separates his honest from his dishonest gains, or submit to unfavorable presumptions.

7. **Odium Spoliatoris.** No fitter case can be presented for the application of the rule *omnia praesumuntur in odium spoliatoris.*

8. ——: SECONDARY EVIDENCE. The referee erred in holding this rule inapplicable until secondary evidence has been given in place of the suppressed or destroyed testimony. This would nullify the rule. If a party is armed with secondary proof he has no need of presumptions.

9. ——: PRESUMPTIONS. In such a case the court will enter into no minute calculations. The petition avers defendant by misuses of firm money made $200,000 profit on whisky. The court will presume this to be true. One-half of that sum belongs to Pomeroy. A decree will be entered in favor of his administrator for $100,000, with interest at six per cent per annum computed with annual rests to date of decree, but on the condition that plaintiff will abandon all claim on account of the voucher transactions.

10. **The Defendant Benton filed a Petition for Rehearing. Af-**

ter considering the petition the court modified its rulings as follows: (1) Though Egbert was not a partner, he was entitled to one-eighth of the profits, and seven-eighths of the profits only should be divided between the partners. (2) The court had erred in supposing the petition averred $200,000 profit was made on whisky; the averment being in fact, that $200,000 profit was made by defendant on whisky and other articles. (3) Though the rule *in odium spoliatoris* is justly applicable to defendant's conduct, the court on further consideration will presume the profits on whisky realized by defendant from misuse of firm money were only $100,000. One-eighth of the amount would belong to Egbert and $43,500 to each partner. The decree will be entered against defendant for $43,500, with interest at the rate of six per cent per annum computed with annual rests from January 1st, 1865, to date of decree; that is to say $123,255, on condition that plaintiff release all further claim. NORTON, RAY and SHERWOOD, JJ., concur; HOUGH, C. J., and HENRY, J., dissent.

Appeal from St. Louis Court of Appeals.

REVERSED.

January 13th, 1868, George Pomeroy filed his petition in the circuit court of St. Louis county stating that in 1858 he and the respondent Benton formed a partnership to conduct a wholesale dry goods business in the name of Pomeroy & Benton. They were to share equally the losses and profits. Neither was to engage in any other mercantile business, nor use the firm name otherwise than in its regular business, nor incur a personal liability for any other person without the written consent of the other partner. The partnership agreement was several times renewed. January 1st, 1862, it was extended for four years with an additional stipulation that ten per cent interest on the capital accounts could be withdrawn on the 1st days of July and January. The partnership business was continued until January 1st, 1865. During its continuance Pomeroy resided in New York and New Jersey. That Benton resided in St. Louis and had charge of the business of the house there, and full knowledge of all its details, and Pomeroy had only such information as he derived from Benton. In January, 1865, one year before the partner-

ship was to expire by the contract, Benton went to New York and purchased all Pomeroy's interest in the house for $275,000, much less than its value. That before Benton went to New York he had forwarded to Pomeroy a false balance sheet of the house. That to induce Pomeroy to sell, he falsely represented that the balance sheet set forth the true condition of the partnership business. That Pomeroy relied on these representations and sold accordingly. That Benton knew the balance sheet was false at the time of his representations. That said balance sheet contained no account of certain dealings of Benton with the moneys of the firm in government vouchers, receipts and securities, and whisky; and that in these dealings which were concealed from Pomeroy, the firm had realized a profit of $200,000.

The defendant Benton denied all charges of fraud; averred that the balance sheet was made up by the clerks of the house, and by them forwarded to Pomeroy. That the books of the house were faithfully kept, and open to Pomeroy's examination; and he had opportunity to know everything, and did know everything about them. Benton denied dealing with firm moneys as charged in the petition; and denied that profits were realized as alleged.

The cause was heard and decided by the circuit court in 1873 in favor of Benton. On appeal to the Supreme Court the judgment was reversed in 1874; 57 Mo. p. 531; the Supreme Court holding that Benton's dealings in vouchers and whisky were fraudulent and he must account therefor as a fraudulent trustee. When the cause was remanded to the circuit court Benton amended his answer to the effect that after January 1st, 1862, it was agreed that John D. Egbert, as an employe, should have one-eighth of the profits. That each partner might draw out from the capital $100,000, also small amounts of unemployed capital. Pomeroy's reply denied the allegations of the answer. June 12th, 1875, the cause was referred to Hon. Edward A. Lewis, to hear all competent testimony offered by the

parties and state the account between the parties in accordance with the opinion of the Supreme Court, and make report, etc.

September 15th, 1875, the hearing came on before the referee. The plaintiff's evidence, so far as material, was as follows:

(1) The articles of co-partnership.

(2) Andrew Johnson testified, that Benton told him he made a great deal of money in whisky and cotton. The profits were talked of as $100,000, and $75,000 in whisky. This was before the dissolution of the firm of Pomeroy & Benton, and in the presence of one Ramsey. Mr. Ramsey was called as a witness and contradicted the statement of Johnson.

(3) George H. Chase testified that just before the tax of $2 per gallon was imposed on whisky by congress, Benton told him he, Chase, had sold his high wines too soon. He did not say how many barrels of whisky he, Benton, had then; but he put some figures on a paper which amounted to 60 or 70,000. No dollars or barrels were written, but the result produced by multiplication was 100,000. Benton appeared to wish to tease, and was drinking. It was the same day congress laid on the $2 tax.

(4) Hecter McLean testified he had an operation in whisky with Benton, thirty to fifty barrels bought of Mauntel Bulte & Co. prior to the $2 tax. Benton told McLean he made a heap of money on whisky.

(5) The plaintiff offered in evidence a deposition of Benton taken in the cause. Defendant Benton made two objections to reading this deposition. (1) It cannot be read as a deposition because defendant is present and ready to testify. (2) It cannot be read as an admission because it is a deposition. The referee sustained the objections. It was afterward admitted to impeach Benton as a witness for himself. In this deposition Benton testified he bought between 1,700 and 1,800 barrels of whisky, and no more; 1,000 barrels of it in Chicago, the rest in St. Louis. Could

not remember the persons from whom he got it; that he got some of Mauntel Bulte & Co. and Von Phul. Bowen & Co. bought some for him, and Catherwood bought thirty-six barrels. The money used to purchase it was raised by discounts. He could not tell if he used the firm name on the paper or not. He must have had a memorandum of the paper used, and he thought the names of Chase Bros. and Hastings & Gordon were on the paper. Could not recollect the amounts. The whole amount of paper discounted to buy the whisky was $70,000 about. Part of the discounts were at the State Savings Association; could not remember if all was discounted there. He could not remember if the name of Pomeroy & Benton was on the whisky paper or not. He had money of his own. Could not tell how many barrels Bowen & Co. bought for him, but it was 500 to 600 barrels. They rendered him bills of purchase. Don't know where they are; don't know how the bills were rendered, whether in the name of Bowen & Co., or Pomeroy & Benton or William H. Benton. Cannot remember. They were intended to be in name of William H. Benton. Cannot remember how many lots Bowen & Co. bought. He was not here, but the house of Pomeroy & Benton paid for the whisky by its check when he was not here. It was between $47,000 and $48,000. The money was charged to him. The money was his own and had been credited to him on the books of Pomeroy & Benton.

The witness further testified that after he was sued by Pomeroy he sent for John H. Bowen and had an interview with him at his, Benton's, house in St. Louis. That he desired to see Bowen about the whisky, and to learn from Bowen why an account of 142 barrels was in the name of Pomeroy & Benton. He, Benton, then and there had all the accounts of sales of whisky made for him by Bowen & Co. The net profits received by him on whisky was less than $20,000. If he had said he had bought 5,000 barrels of whisky it was jocular; he is now stating the truth.

Benton testified he did purchase government vouchers during said partnership, in 1864; could not remember the amount he paid for them by checks of Pomeroy & Benton. They were bought at a discount of from seven to eleven per cent; could not remember how soon he collected the vouchers from the government; the money used to buy the vouchers was charged to him; the check books of the house show the facts; and think he used $200,000 in the purchase of vouchers; cannot say that Pomeroy knew of his dealings in vouchers or whisky; believe he must have known it; he did not tell Pomeroy of it. He considered the risk his own, and paid the firm eight and a half per cent interest on the money used; cannot remember that Egbert was to have an interest in the whisky transaction. If he had it was only one-eighth of St. Louis whisky. Egbert's interest in Pomeroy & Benton was a contingent salary. Pomeroy had no interest in the whisky because he paid no attention to it.

On cross-examination Benton stated that from January 1st, 1864, to July 1st, 1864, each partner drew out of the firm $100,000 to use as he pleased; thinks he realized $26,000 to $27,000 net profit on vouchers; cannot remember exactly; there was a loss on the Bowen whisky about $150; that was 565 barrels, sold in July, 1864. Pomeroy had access to the books and is a competent bookkeeper. The bookkeeper sent the balance sheet to New York of his own motion. He, Benton, tried at first to sell to Pomeroy. He, Benton, made no representation about the balance sheet. He and Pomeroy both assumed it to be correct. Benton closed the purchase February 4th, 1865; to relate back to January 1st, 1865. Benton paid Pomeroy $151,000 and some hundred dollars in 5-20 United States bonds, and his notes for $62,500 payable in one and two years. He could not remember Pomeroy's ever speaking to him either about the whisky or voucher transactions. He could not say there is anything on the books to show Pomeroy he was charged interest on the money he used.

The witness testified he saw the balance sheet in Pomeroy's hands prior to the sale to him.

(6) The plaintiff put in evidence another deposition of Benton given by him on his own application to vacate an order of court upon him to produce, for the use of plaintiff, the book in which he kept an account of said whisky transactions. Benton testified he had entered in a book kept by him in 1864 all the accounts of said whisky transactions; it was a private book. He destroyed it in July, 1865; burned it up, because he had no use for it; having transcribed from it all live accounts into another book. He did not destroy all the book, but tore out the leaves that had the accounts on them and destroyed them. He did not destroy the binding of the book. What remained of the book, he said, was at his house. The whisky account was destroyed because he had no room to keep it. The whisky account was not contained in any other book. The whisky account was destroyed before this suit was commenced. After the commencement of the suit he had at his store the accounts of sale of the whisky; and had only one bill of purchase. In July, 1864, he gave all the bills of purchase of the whisky to Bowen; cannot remember ever seeing them since he gave them to Bowen, because the whisky was bought in his, Bowen's, name. The whisky was billed to Bowen & Co., and not to Pomeroy & Benton. Well, he don't know the memoranda of his purchases of vouchers were on Pomeroy & Benton's check books and cash books. All his private matters were entered in the burnt book. He burnt up the whole whisky matter.

Cross-examined. He said he bought the whisky with his own money. Part he sold in June, part in July, 1864. It was not a firm transaction. He destroyed the book because he did not wish any one to look into his private accounts. He often destroys his account books, but he can't now state everything as minutely about the whisky accounts as if he had the burnt book. That is, with the

exception of the amount of charges on thirty-six barrels.

(7) Wm. H. Sturgis testified that in the fall of 1864 Benton deposited in the bank of Sturgis & Sons, in Chicago, $60,000 or $70,000, saying, "this is one of my operations in high-wines;" this was after the government tax of $2 per gallon was imposed on whisky.

(8) John D. Egbert testified he was to have as compensation for service an interest in the profits of the house of one-eighth. He bought sixty barrels of whisky jointly with Benton. Never knew Pomeroy to use any money of the house for his own benefit. That he, Egbert, paid through Bowen for one lot of whisky $20,000.

(9) Edwin C. Catherwood testified that in 1864 he had a contract with Benton that in consideration of information given by him to Benton, that congress was about to levy a tax of $2 per gallon on whisky, Benton would invest $100,000 in whisky, hold it till the tax advanced the price, then sell it and divide the profits equally with Catherwood. That Benton told him he bought 500 barrels through Bowen in Chicago; also other lots witness could not remember. Benton paid witness $5,000; told witness he cleared $25,000 on whisky. That he, Benton, had had something to do with a large lot, but that was only as agent.

(10) John A. Mott testified he sold to Benton in February, 1864, 1,000 barrels of whisky at eighty-five cents per gallon, and in June, 1864, Benton sold it for $1.26 per gallon, and the net proceeds were $74,471.95.

(11) The check book and cash book of the house of Pomeroy & Benton showed that on August 11th, 1864, and from that day to and on December 13th, 1864, Benton purchased with funds of the house of Pomeroy & Benton, $297,571.69 of government vouchers, and realized a net profit thereon of $25,798.58. None of these profits were embraced in the balance sheet shown to Pomeroy for January 1st, 1865; nor did said balance sheet embrace any profits realized by Benton on whisky.

(12) The ledger of Pomeroy & Benton showed that between January 1st, 1864, and January 1st, 1865, Benton drew out of the house and used for some purpose of his own, $474,143.42.

(13) The burnt book was produced in evidence, and showed 117 pages cut out, many others partly cut out. The entries which remain to be seen aggregated over $100,000. The book contained originally 288 pages, and much of it was intact.

(14) The said ledger showed that the moneys drawn out by Benton were returned generally within a month.

(15) The cash diary of the house of Pomeroy & Benton showed that from January 4th, 1864, to December 22nd, 1864, Benton used $111,439.78, moneys of the house, which were not posted to his account nor entered on the cash book.

(16) C. W. Ford testified that Benton never told him what sums he invested in whisky, or what profit he made. But witness' idea from what Benton said is, they were large, and that Benton made a great deal of money.

(17) Munson Beach testified that the house of Pomeroy & Benton purchased vouchers largely in 1864. He went to collect $140,000 of vouchers at one time; collected $70,000 that time. It was in 1864 or 1865. He got the money by going into a private office of the quartermaster while many waited outside. Knows goods were sold for vouchers by Pomeroy & Benton.

(18) George Pomeroy, the plaintiff, testified he made the sale to Benton on the faith of Benton's statement that the balance sheet of January 1st, 1865, was correct; Benton said he knew it was correct; that he, Pomeroy, at the time knew nothing whatever of Benton's dealings in vouchers or whisky with the partnership funds. Benton having stated in a letter to Pomeroy, which was put in evidence, that Pomeroy had used the moneys of the house for his own private benefit, this witness was asked whether he had done so. The counsel for Benton objected to the ques-

tion as incompetent, because no such charge was made by Benton against Pomeroy. The referee sustained the objection, and would not let the plaintiff answer.

(1) Wallace Delafield, for defendant, testified that he was bookkeeper for Pomeroy & Benton from January, 1862, to January, 1865; made out the trial balance of January 1st, 1865, and forwarded it to New York. Benton gave him no directions. The trial balance of July 1st, 1864, was made out by Mr. Medard, assistant bookkeeper. That on the 19th of April, 1864, Pomeroy telegraphed Benton to hold all greenbacks till further order, and there never was a further order. The balances against Geo. Pomeroy, the plaintiff, on the books of Pomeroy & Benton, were as follows:

January 1st, 1864,	$ 60,000 00
February 12th, 1864,	60,483 33
January 30th, 1864,	60,359 60
February 26th, 1864,	61,666 33
March 29th, 1864,	27,289 83
April 26th, 1864,	62,911 19
May 27th, 1864,	63,847 19
June 30th, 1864,	59,662 57
July 1st, 1864,	100,000 00
July 26th, 1864,	103,306 00
August 31st, 1864,	104,541 15
September 24th, 1864,	115,572 12
December 31st, 1864,	103,000 00

Interest on this account at eight per cent per annum was calculated every six months. There is on page 189 of the cash book of Pomeroy & Benton an entry showing the interest charged to Benton for moneys loaned him by the house, was $352.08. He further testified he wrote to Bowen & Co. a note, viz:

ST. LOUIS, June 30th, 1864.

Messrs. John H. Bowen & Co.:

Dear Sirs: We wish you would send us to-day a full

statement of high-wines bought and sold, as we wish to close up the account. Upon receipt of the same, we will pay balance due you.

Yours truly,

POMEROY & BENTON.

(2) John H. Bowen, for defendant, testified that in 1864 his house sold whisky for Benton. The amount was 812 barrels. They rendered him accounts of sales for all but thirty-six barrels. The accounts of sales were rendered in the name of Benton, and some Pomeroy & Benton. Benton told him it was his whisky. He knew of a 1,000 barrels bought by Benton in Chicago. This witness was examined at length to find out the amount of whisky his house handled for Benton, and he gave it from time to time as 812 barrels bought and sold exclusive of the 1,000 barrels at Chicago. The number of barrels purchased by his house for Benton in St. Louis, was stated to be 540, 550 and 565; the number of barrels sold by his house for Benton in St. Louis, he stated from time to time as 812, 876, 865, 849, 730, 875 and 776, and finally he could not remember; could not get possession of his books. That he gave the bills of purchase to Benton, also the accounts of sales. That he saw all of them at Benton's house in St. Louis in 1868. That Benton sent for him to come there, and the two went over all the whisky accounts. Benton had these accounts in his possession, and showed him "What the whisky cost, so and so," and sold for "Such and such." Benton had a book. The statement may have been in the covers of the book. His recollection is, the book was open. The account was loose within the book. He supposes the account was on the leaves of the book. The loose paper was an aggregate. He and Benton were investigating; but he cannot tell what. Benton wanted him to refresh his memory, but what about he cannot tell. Benton's counsel called witness' attention to a paper in this form, viz:

February 5th, 1864, bought . . .	1,000	barrels.
May 21st, 1864, bought	212	"
June 25th, 1864, bought . . .	565	"
	1,777	
Also	36	"
Total	1,813	

"All the papers relating to this investment, except the check given to Catherwood in payment, were lost or destroyed at the time of removal of stock, books and papers from the corner of Washington avenue and Fourth to 513 Main street. Hence, I can't give items of storage, insurance," etc., and questioned the witness if that paper was not the one he saw at Benton's house in 1868. The witness said that may have been the paper. The witness being asked whether, on the first trial, he did not say in answer to the same question, "Before God, I never saw that paper before," replied, "I may have said so. I cannot identify the paper. I cannot recollect." Witness was asked by plaintiff's counsel to produce the sales book of his house, and said: "I don't know where it is. I can and will produce the ledger, day book, journal and blotter." He never did.

(3) Benton appeared again as a witness for himself and testified, so far as material; that Egbert was interested to the extent of one-eighth of the profits. He did not see the balance sheet or inventory before they were sent to Pomeroy. The clerks made them out. He took no part in it. He cannot relate the conversation with Pomeroy about the sale to him. It is natural for partners to talk over business; but he cannot recollect the conversation; cannot recollect the substance of it. It is a long time ago. He cannot say what examination Pomeroy made of the books when he came to St. Louis, once or twice a year. He saw them if he pleased. January 1st, 1864, the capital of each partner in the house was $140,000.

It was agreed in 1863 that each partner could draw out $60,000 up to January 1st, 1864; and $40,000 more up to July 1st, 1864. He drew out $60,000 and invested it in high-wines. Pomeroy told witness he drew out $60,000 and invested it in stocks. He Benton, began to purchase high-wines February, 1864, and sold all in July, 1864; purchased 1,813 barrels; sold 1,812, one lost by leakage. The proceeds of the 1,000 barrels bought in Chicago, viz: $74,471.95, he deposited with Sturgis & Sons, bankers, in Chicago, on June 23rd, 1864. It was the only deposit he ever made there. All the bills of purchase of whisky were given to Bowen to sell the whisky. Never noticed till this suit that the account of sales for any of it was in the name of Pomeroy & Benton. The whisky was his own, and all bought with his own funds. He bought 248 barrels in St. Louis besides the 565 barrels Bowen bought for him; that is, 212 barrels of Mauntel Bulte & Co., and thirty-six barrels through Catherwood. Bowen & Co. bought 565 barrels. He paid Bowen & Co. for this whisky in six checks on the house of Pomeroy & Benton, which he produced. viz:

June 11th, 1864, . . .	$ 3,000 00	
June 23rd, 1864, . . .	12,000 00	
June 27th, 1864, . . .	25,000 00	
June 29th, 1864, . . .	2,000 00	
June 30th, 1864, . . .	294 50	
July 1st, 1864, . . .	5,421 16	$47,715 66

There was no indorsement of Bowen & Co. on the check of July 1st, 1864. He had no bills of the purchase of this whisky; he gave them all to Bowen. In explaining this, Benton said he paid for this whisky in one single check for $47,715.66, and it was then found he had overpaid by the amount of the July 1st check, $5,421.66, and Bowen & Co. gave that check to him to pay back the overpayment. The account sales of the 565 barrels showed there were in the lot 29,312 17-100 gallons, and being purchased for $47,715.60, the cost per gallon was about $1.62.

The market price of whisky about the time of the purchase was $1.24 to $1.26 per gallon. The witness said he directed the bookkeeper to keep an accurate account of all moneys of the house used by him to buy vouchers, and charge him interest at eight per cent per annum. He had not looked particularly to see if it was done; can find on the books only two entries of interest, $352.08 and $130.67. The money used to buy whisky was raised by discounts at the State Savings Association; don't know what paper was discounted; it was about $70,000; cannot remember whose paper. He did not say to Chase what he testified, about his selling too soon, and he, Benton, holding a large amount of whisky.

(4) It was in evidence that the following paper of the house of Pomeroy & Benton was discounted by the State Savings Association for the benefit of Benton, all indorsed by Pomeroy & Benton:

February 5th, 1864, Ralli & Co., note . .	$20,000
February 5th, 1864, Ralli & Co., note . .	10,000
February 4th, 1864, Hastings & Gordon's note	10,000
February 8th, 1864, Chase Bros.' note . .	10,000
February 8th, 1864, Chase Bros.' note . .	10,000
June 1st, 1864, Hastings, M. & Co.'s note .	12,000
Total	$72,000

The learned referee, in his report, dissented from the views of the Supreme Court in 57 Mo. 531, holding that on the foregoing evidence Benton had not committed fraud but had acted in good faith; that the conduct of Benton was one of mistake at the most, mere unintentional error; that his, Benton's, testimony furnished in general a satisfactory explanation of his transactions. Nevertheless, considering that Benton had used a small portion of the moneys of the firm without authority, but in good faith, the referee recommended a judgment against him for $15,530.60, with simple interest from the institution of the suit; that the facts in evidence furnished no sufficient

ground of presumption *in odium spoliatoris*, and such presumption could never be admitted without previous introduction of secondary evidence of the contents of the destroyed evidence. The referee reported further, that on the testimony adduced, the plaintiff Pomeroy had misused the money of the firm for his own benefit, and was tainted with all the moral and legal wrong charged against Benton.

The novelty of the questions in this cause in this State, at least, and the importance of the principles discussed, have seemed to demand the foregoing full statement of the testimony.

Glover & Shepley, *Samuel Knox* and *James O. Broadhead* for appellant.

J. M. & C. H. Krum, *J. L. Smith*, *R. E. Rombauer* and *Cline, Jamison & Day* for respondent.

Sherwood, J.—When this cause was in this court on a former occasion, (57 Mo. 531,) we examined the record with the most patient and laborious attention. The result of that examination was, that the defendant was declared a fraudulent trustee, the judgment reversed, and the cause remanded with directions to have an accounting on that basis. The defendant did not move for a rehearing in this court either on matter of fact or matter of law. The cause on its return to the circuit court was committed to a referee, with instructions "to hear all competent testimony that may be offered by the parties, and state the account between said parties in accordance with the opinion of the Supreme Court herein, and make report," etc. The sole duty of the referee, as seen from those instructions, was simply to take an account of the amount due by defendant, treating him as a fraudulent trustee, for this was "in accordance with the opinion of the Supreme Court herein." But the learned referee could not, as seen by his report,

confine himself within the narrow limits assigned him; he must needs investigate other things and look into other matters, *de hors* his duties and instructions. He must needs see whether the opinion of this court was correct, and wherein he deemed it incorrect, he must needs proceed to correct it.

The record now before us does not substantially differ from that presented on a former occasion. There was an array of evidence showing the defendant's fraud, which we regarded as conclusive, and so found and declared when we reversed the judgment and remanded the cause. We have ruled that where we have remanded a cause with directions as to the further proceeding of the trial court, that there the case does not present the same phase as if there had been a simple reversal and remanding; that when special directions have been given as aforesaid, it is out of the power of the lower court to open the cause and have a new trial. *Chouteau v. Allen*, 74 Mo. 56. Under this ruling even the circuit court would have been powerless to have done otherwise than as in our mandate directed, and of consequence so would the referee. But the referee was not content to yield obedience either to our mandate or the instructions of the circuit court. We found in the record abundant *indicia* of fraud. The referee took it upon himself to say that there was no fraud, although upon every hand, in this, as in the former record, fraud and fraudulent practices on the part of the defendant in appropriating the funds, credits and assets of the partnership to his own use; in deceiving his partner by a false balance sheet, and false representations concerning the same; in the destruction and fabrication of evidence; in evading at the hearing direct questions as to matters with which he must have been familiar, and with which a court of equity will hold he was familiar; in answering that he did not know, could not remember, etc., respecting amounts, dates and other things touching the transactions in which he had been engaged, which even the most ordinary memory

could not fail to recall—are patent to even the most cursory observation. The referee, however, notwithstanding that, in the face of the finding and judgment of this court, and it may be added in the face of the most convincing testimony to the contrary, he acquitted the defendant of the charge of fraud, yet nevertheless, he found the defendant indebted to the plaintiff in a comparatively small sum, $15,350.60⅔, with simple interest thereon from date of suit brought January 13th, 1868, at six per cent.

This finding and ruling of the learned referee was erroneous upon the facts in evidence as it was illogical in law. If there was no fraud on the part of the defendant in any of the ways charged in the petition, then the plaintiff's case fails, and that is the end of the matter. In the absence of fraud or improper concealment, its equitable equivalent, the agreement, the bill of sale of January 1st, 1865, being sufficiently comprehensive in its terms, passed to defendant every right and interest in the partnership affairs which the plaintiff possessed, and operated, on its execution, as an absolute discharge of further liabilities of defendant to the plaintiff respecting the same. This view of the point was very properly taken by the court of appeals, His Honor, Judge Bakewell, very pertinently observing, (in an opinion which does not appear in print): "But if that deed was obtained in good faith it was clearly a complete discharge. To hold that the settlement with, and deed of Pomeroy, was not a discharge, is plainly to hold that they were obtained by misrepresentation, that the balance sheet exhibited to plaintiff by defendant, upon the faith of which plaintiff sold his interest in the concern to defendant for $275,000, was accompanied with concealment concerning the business of the firm and the value of plaintiff's interest in it."

This is what the Supreme Court finds. The referee finds the contrary. The two findings cannot stand together. If Benton was guilty of no unfairness, he should not have been charged at all; the settlement should not

be opened. If he is to be considered in all respects as a fraudulent trustee, he should have been treated and charged in all respects as a fraudulent trustee. Interest should not have been computed without rests, merely as simple interest at six per cent, and presumptions should have been indulged against him, which on his theory of the case the referee did not and could not indulge. To say, as the Supreme Court does, that Benton is to be treated in all respects as a trustee, is to find that he obtained an unfair advantage, or the words have no meaning at all." But the learned judge speaks apologetically for the referee, by saying, "He felt himself hampered, no doubt, by the opinion of the Supreme Court, and having arrived upon the same evidence at an opposite conclusion on the question of fraud." Had the learned judge been at the pains to read the evidence as well as the ruling made by the referee, which he confesses he did not, he would not have thought that the latter "felt himself hampered" either by the opinion of this court, or indeed by that of any other court or by the text writers.

For instance, among the rulings of the learned referee (which were for the most part in favor of the defendant), the plaintiff offered as evidence in chief the deposition of defendant taken in this cause June 8th, 1868. To this deposition defendant's counsel took two novel objections: 1st, That it could not be read as a deposition because the defendant was present. 2nd, Nor as an admission because it was a deposition. These objections were held well taken and the deposition rejected. Nor was it admitted at all, except as impeaching evidence. It is scarcely necessary to say that this ruling of the learned referee has no support either in reason or authority. If defendant had made an admission verbally on the street respecting the subject matter of the suit, it would have been original evidence against him and *a fortiori* would it, when contained in a deposition taken under the solemn forms of the law. Weeks

on Dep., § 464; *Kritzer v. Smith*, 21 Mo. 296; *Charleson v. Hunt*, 27 Mo. 34.

The deposition, however, is preserved in the record, and we shall treat it as though admitted in chief. The learned referee did not see fit in his voluminous report to make allusion to this important ruling, which so far as concerned his action, deprived the plaintiff of most important and original evidence. Not less peculiar was another ruling made by the learned referee; he refused to permit plaintiff to testify that he had never used a dollar of the money of the firm at New York, and yet in his report, he found and adjudged that plaintiff made overdrafts and was tainted with all the moral and legal wrong which could attach to the defendant for such uses of the firm money. Properly enough the learned referee refused permission to plaintiff to testify as above stated; for there was no such issue raised by the pleadings; but for the selfsame reason, also, he should have refrained from passing upon what was not before him; thereby reducing, if possible, plaintiff, whose testimony and conduct were characterized by the utmost straightforwardness, ingenuousness and candor, to the level of that of the defendant, whose testimony and conduct were a mere tissue and series of evasions, subterfuges and fraudulent devices.

But we pass from the action of the referee to that of the circuit court and that of the court of appeals. The latter court entertained the view that it could not consider the cause on its merits, and, therefore, remanded it, because the circuit court did not approve the report of the referee. This view was not a sound one. The circuit court did approve the report of the referee. This was the necessary consequence of overruling the exceptions of the plaintiff, whose exceptions, twenty-three in number, covering every part of the report, were considered and all overruled but two, and those only partially. No proposition in law is better established than that the report of a referee is confirmed when exceptions thereto are held for naught. 2

Barb. Ch. Pr. 555; 2 Smith Ch. Pr. 378; *Huston v. Cassidy*, 14 N. J. Eq. 320; *Davis v. Roberts*, 1 Sm. & M. Ch. 543; *O'Neill v. Capelle*, 62 Mo. 202; *Taylor v. Read*, 4 Paige 561.

For this reason, the court of appeals should have proceeded to examine the cause on its merits and entered a final judgment adjusting the matter at issue between the parties litigant. We shall proceed to such adjustment now, and doing so, we shall not in this opinion, examine the evidence in detail; we shall not make minute calculations as to the misappropriation by defendant of this amount in the purchase of high-wines; or that amount in the purchase of vouchers, or the defendant's profit arising therefrom. Any complication or uncertainty pertaining to these matters it belonged to the defendant as a trustee charged with a breach of trust to explain and make clear; to distinctly draw the line which separated his honest gains from those which were grossly otherwise. Failing in this, as he did, all doubts must be resolved against him. So say all the authorities. Kerr Fraud and Mistake, pp. 151, 182; *Pomeroy v. Benton*, *supra*; *Heath v. Waters*, 40 Mich. 457; 1 Glf. Ev., § 34.

It is impossible to tell what was the amount which the defendant realized by reason of his fraudulent practices. The self-same evasive manner which characterized the defendant's testimony on a former occasion, characterizes it still. Therefore, our remarks heretofore made respecting it are still applicable, and we repeat them. The statement is indeed made by the learned referee that the defendant made full explanation of his whisky, voucher and other transactions. This statement finds no support in the facts disclosed by this record. There is abundant testimony contained therein showing that defendant was engaged in whisky transactions other than those which resulted in the purchase and sale of 1,813 barrels of whisky; and we are warranted in presuming against the defendant as a fraudulent trustee who forgets, who cannot remember when asked the plainest and most direct questions about the

simplest matters, that it was his duty to remember, that the magnitude of his transactions in vouchers have been but partly ascertained. How often the money defendant invested, in vouchers or in whisky either, was turned over, was re-invested, never will be known.

We have mentioned heretofore the fabrication of evidence. There is much in this record to induce us to believe that the check for $5,421.16 was fabricated for the occasion in order to show that the sum of $47,715.60 was paid for the purchase of 565 barrels of whisky. Unfortunately, however, for the success of the scheme, the check was never handed to Bowen & Co. to be indorsed by them, so that this check, as the matter stands, shows that Bowen & Co. had received on the big check for $47,715.60, $5,421.16 more than was due them, and in order to pay this back to Benton the check for the latter sum was drawn by Pomeroy & Benton on their cashier, and by him indorsed to Benton. It is clear that if that check had ever been collected by Bowen & Co., it would have borne their indorsement. The books abound with instances as to the unfavorable presumptions to be indulged against those who manufacture evidence. 3 Glf. Ev., § 34; *Winchell v. Edwards*, 57 Ill. 41; 1 Phil. Ev., 639.

We come now to the destruction of evidence by the defendant; of the destruction of the book in which the accounts of his whisky transactions were kept. We passed upon this point when this cause was here before. We see no reason now to change, but every reason to support and confirm the conclusion then reached, that defendant destroyed that book after suit brought, for the deliberate and sole purpose of cutting off investigation into the magnitude of his operations in whisky. As, then, the defendant has done these things, as he has endeavored by all these means to baffle inquiry and shut out investigation; as in consequence thereof, it has become impossible to ascertain the amount out of which he has defrauded his partner, to whom, as he says in one of his letters, he was bound

by the ties of gratitude, for giving him his start in life, nothing remains to us but to apply to the defendant, the stern rule recognized alike in equity and at law embodied in the maxim *omnia praesumuntur in odium spoliatoris.* No fitter case than the one in hand could ever be presented for the application of this rigid maxim.

The learned referee appears to have thought, for so he reported to the circuit court, that before the rule can be applied "secondary evidence" as to the contents or character of the evidence destroyed must first be introduced; must be laid as a basis before the presumption can be invoked. Nothing can be further from the law. It would seem too plain for argument, that if secondary evidence were at hand, all need for the application of the rule would cease, and that if the rule could not be applied unless upon the production of secondary evidence, then the spoiler could assure his success, by cutting off every source of information and every supply of evidence; could become successful in proportion to the destruction he had wrongfully wrought. The authorities give no countenance to such an idea. It is because of the very fact that the evidence of the plaintiff, the proofs of his claim or the muniments of his title, have been destroyed, that the law, in hatred of the spoiler, baffles the destroyer, and thwarts his iniquitous purpose, by indulging a presumption which supplies the lost proof, and thus defeats the wrong-doer by the very means he had so confidently employed to perpetrate the wrong. One of the familiar illustrations given of invoking and applying the presumption, was where the plaintiff "a chimney-sweeper's boy found a jewel and carried it to the defendant's shop (who was a goldsmith) to know what it was, and delivered it into the hands of the apprentice, who, under pretense of weighing it, took out the stones, and calling to the master to let him know it came to three half-pence, the master offered the boy the money, who refused to take it, and insisted to have the thing again, whereupon the apprentice delivered him back

the socket without the stones," and on trover brought, "several of the trade were examined to prove what a jewel of the finest water that would fit the socket would be worth, and the chief justice directed the jury, that unless the defendant did produce the jewel, and show it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels the measure of their damages, which they accordingly did." *Armory v. Delamirie*, 1 Stra. 505. It is easy to see that the chimney-sweep's boy would have been in but sad case, if he had been required to show by "secondary evidence," what the contents of the empty socket were; something which he knew not; something which the spoliating defendant alone knew.

Numerous instances are given in the books of the like application of the rule, where it is held that spoliation of documentary evidence being proved against a defendant, that thereby he is held to admit the truth of the plaintiff's allegations; and this upon the ground that the law, in consequence of the fraud practiced, in consequence of the spoliation, will presume that the evidence destroyed would establish the plaintiff's demand to be just. 1 Glf. Ev., § 37; *Barker v. Ray*, 2 Russ. Ch. 73; 1 Taylor Ev., p. 130, § 116; *Dalston v. Coatsworth*, 1 P. Wms. 731, and cases cited; Broom's Leg. Max., 938, and cases cited; 1 Phil. Ev., 602, and cases cited; Anon., 1 Ld. Raym., 731; *Attorney Gen'l v. Windsor*, 24 Beav. 679; *Heath v. Waters*, 40 Mich. 457; *Annesley v. Anglesea*, 17 How. St. Tr. 1139; *Ld. Melville's case*, 29 How. St. Tr. 550; *Blade v. Noland*, 12 Wend. 173; *Harwood v. Goodright*, Cowp. 86.

As a sufficiently full statement of the evidence will be made, we deem it unnecessary to encumber this opinion by going into the evidence in detail. But upon perusal of that statement, it will be found that a sufficient basis has been laid in that evidence, from which the presumption may be properly invoked, whether we adhere to the extreme application of the rule as announced by Lord El-

don in *Barker v. Ray, supra*, or whether we apply the presumption in a more limited way as indicated by some of the authorities.

Applying, then, the rule mentioned, to the case before us, we shall hold the defendant is indebted to the plaintiff, as charged in the petition, which alleges that defendant dealt in whisky, thereby realizing a net profit to the amount of $200,000. One-half of this sum would, of course, belong to plaintiff, and treating the defendant as a trustee guilty of a flagrant breach of his trust, we, therefore, order, adjudge and decree, that interest at the highest legal rate, (where there is no contract,) six per cent, be computed with annual rests on the sum of $100,000, from the 1st day of January, 1865; that the judgment as well of the circuit court as of the court of appeals be reversed and judgment entered for said sum last named, and interest, either here or else in the lower court, leaving it optional with the plaintiff in respect to the court where judgment shall be entered.

In relation to the voucher transactions of defendant, we are by no means satisfied with the findings of the learned referee. He fails, as we think, to charge the defendant with such an amount as the evidence in our opinion shows the defendant should be charged, and the learned referee fails to draw the proper inference respecting one important item of $58,592.48, being a certificate of indebtedness of the United States. Concerning this certificate the defendant was silent, and the referee erred in supposing the voucher represented by this certificate to be a part of those in exhibit W 2. If the plaintiff desire, we shall direct another accounting in the lower court, to be taken on the evidence now in this record, of those voucher transactions; in which accounting such unfavorable presumptions as the law authorizes will be indulged against the defendant, treating him as a fraudulent trustee. But we leave it optional with plaintiff, whether he will have such fresh accounting, or whether he will enter a waiver thereof

in this or the lower court. NORTON and RAY, JJ., concur; HOUGH, C. J., and HENRY, J., dissent.

On Rehearing.

NORTON, J.—It is insisted by the counsel in their motion for rehearing that the judgment rendered is excessive, first, because Egbert, a clerk in the mercantile house of Pomeroy & Benton was to receive as compensation for his services one-eighth of the profits, no account of which was ever taken into consideration, and secondly, because the rule *in odium spoliatoris* was improperly applied, in this, that the sum of $200,000, alleged to be the profits arising out of speculations in whisky and other articles of merchandise, was improperly taken as the measure of defendant's liability; for the reason that the amount of profits made from the purchase of whisky and high-wines could only be ascertained and distinguished from the profits made in speculations in other merchandise, such as cotton, tobacco, bacon, lard, etc., by a resort to the evidence. Both these positions seem to be well taken. While the mere fact that Egbert was to receive as compensation a certain portion of the profits of the capital invested in the concern, did not create the partnership relation between Egbert, Pomeroy and Benton, he was clearly entitled under it to the portion of the profits stipulated for. While it may not have given him a right to have sued as a partner for an adjustment and settlement of partnership accounts, he was, nevertheless, entitled, when such adjustment was made and the profits ascertained, to his proportion.

While we are of the opinion that because of the destruction, by Mr. Benton, of the book containing an entry of all his transactions in whisky or high-wines, he became a spoliator, and subjected himself in this court to the application of the rule of law governing and applied in such cases, and while we are of the opinion that the rule in its utmost stringency would justify us in taking the

amount of profit made out of high-wines and whisky, as claimed in the petition, when supported by the slightest evidence, as the measure of his liability, we think that error was committed in taking $200,000 as that amount, because the petition did not allege that $200,000 were the profits made in speculations in whisky, but that said amount of profits was not out of whisky and high-wine operations alone, but out of speculations in other articles of merchandise as well. It is impossible to tell, from the mere allegations of the petition, what proportion of the $200,000 was made in operating in whisky and high-wines, and what proportion in other merchandise, and the problem can only be solved by looking at the evidence and giving force and effect to the rule *in odium spoliatoris* in considering it.

The evidence shows, beyond question, that Benton speculated in whisky and high-wines with the means of the firm in 1864, and prior years, and that during that year he made large profits in these operations; one or more witnesses testifying to the fact that they understood from Mr. Benton, that his profits on the whisky on hand would be $100,000, and there is other testimony in the record, tending to show the same fact. How much of said profit would be made out of whisky purchased with the money of the firm in excess of the amount he had a right to draw from the firm does not clearly appear. But from this and other evidence showing that he had used money of the firm in whisky transactions, the inference may well be drawn, under the rule above referred to, that the said profit was the result of speculations made with firm money, and we, therefore, take that, as the amount, with one-half of which, after deducting Egbert's interest of one-eighth, which it appears Benton had purchased, with which he should be charged. Said one-eighth interest being deducted from said sum would leave $87,500, one-half of which Benton should account to plaintiff for, with interest thereon at six per cent with annual rests, from the 1st day of January,

1865; and proceeding on this basis, the plaintiff is entitled to a judgment of $123,255. If, therefore, plaintiff will enter a *remittitur* of so much of the judgment heretofore rendered as is in excess of said sum, on or before the first day of the next term of this court, the motion for rehearing will be overruled, and if not, the motion will be sustained.

HOUGH AND HENRY, JJ.—Being of the opinion that the rule *in odium spoliatoris* has not been correctly stated or applied in the opinion of the majority, and being further of the opinion that an account should be stated between the parties as directed by this court when the case was first here, (57 Mo. 549,) and that the judgment of this court should be based upon such an account, we are in favor of sustaining the motion for a rehearing.

THE RIVER RENDERING COMPANY v. BEHR *et al.*, *Appellants.*

Municipal Corporation: REMOVAL OF DEAD ANIMALS: CONSTITUTIONAL LAW. Under the constitution of this State, a city ordinance is void which undertakes to confer upon one person the right to remove and convert to his own use the carcasses of all dead animals, not slain for food, found within the limits of the city, to the exclusion of the right of the owners of the same to remove and use them before they become a nuisance.

Appeal from St. Louis Court of Appeals.

REVERSED.

J. E. McKeighan, E. P. Meany and *L. A. Steber* for appellants.

The construction of the ordinance put upon it by respondent makes it violate section 20 of the bill of rights, which forbids private property from being taken for pri-

vate use, with or without consent of the owner; also, section 30, which forbids the taking of private property for public use without due process of law. *Donovan v. Mayor, etc.*, 29 Miss. 247; *Fisher v. McGirr*, 1 Gray 1, 14. The power of making by-laws for the suppression of nuisances is confined to the suppression and prohibition of acts which, if done, must necessarily and inevitably cause a nuisance. It does not empower the town to impose penalties for the doing of things which may or may not become nuisances, according to circumstances. 1 Add. on Torts, (Wood's Ed.) § 54. Dead animals may become nuisances if not removed in a reasonable time, but if they are so removed they will not. A mere declaration in a city ordinance (even this is not done in the ordinance in question) that a certain thing is a nuisance or an obstruction, does not make it so, unless, in fact, it is a nuisance or obstruction. *Yates v. Milwaukee*, 10 Wall. 497. A dead animal is not *per se* a nuisance, and it is not necessarily dangerous to public health. The owner may still put it to an innocent and useful purpose, and an ordinance which provides for the removal of dead animals cannot be literally construed so as to take away the owner's right to so use it. *Underwood v. Green*, 42 N. Y. 140

Dyer & Ellis for respondent.

The question whether it is for the health and best interest of the city to restrict the duty and right to remove dead animals to one particular agency, thereby preventing free traffic in nuisances, is entirely within the control of the city, and its board of health. This is necessarily a part of the municipal system for the preservation of public health, as much so as appointing a single physician or surgeon to a city hospital, instead of opening the doors to the practice or malpractice of all the doctors in the town. The municipal authorities cannot surround this subject with too many safeguards, and the claim of the scavenger

ought not to prevail over the high duty which a government owes to preserve the health and comfort of its people. An exclusive privilege very similar to that possessed by the respondent, was upheld by this court. *State v. Fisher*, 52 Mo. 174. It needs no argument and requires no adjudication to establish the fact, that the dead animals referred to in this ordinance, are *per se* nuisances, and should be removed as summarily and as certainly as possible from the city limits. *City v. Stern*, 3 Mo. App. 48; *River Rendering Co. v. Behr*, 7 Mo. App. 45. The question which is fundamental in this case is: Who shall determine when a carcass has become offensive? At what moment does the animal cease to be innocuous, and become dangerous? Must this question be in each case judicially ascertained before the city's right and duty attaches? Can the determination of this all-important question be safely committed to the appellants? According to the laws of nature, decomposition begins immediately at death, and the danger then commences. The only safe action for the city to take in the matter is to require, as far as possible, the instant removal of the animal when dead, and to provide the means or agency by which the removal can be safely and certainly effected.

The claim of confiscation is not fairly raised by the issues in this case. No owner is complaining of this ordinance, nor is the right or interest of the owner in any way represented or involved herein. But if it were, his rights are amply protected by section 6 of the ordinance. Under proper and necessary restrictions he may obtain a permit and remove his dead animal. And besides this, so far as the carcass is a nuisance, the right of the city to abate or destroy it, is paramount to the owner's right. A nuisance is not a right, it is a wrong. The owner is presumed to be compensated by his share in the advantages arising from the destruction or removal of the nuisance. Mills' Eminent Domain, § 7; 2 Cow. 349, 352; 12 Pick. 184.

HENRY, J.—This is an appeal from the judgment of the St. Louis court of appeals, affirming the judgment of the circuit court, perpetually enjoining defendant from removing dead animals from the city of St. Louis. The grounds of the injunction are, that the acts with respect to which appellants are restrained, are violative of an ordinance of said city, No. 10,062, and the question involved relates to the validity of that ordinance, which is as follows:

"An ordinance to repeal ordinance number 6,745, entitled An ordinance to repeal ordinance No. 6,016, entitled 'An ordinance to amend ordinance No. 5,433,'" and to provide for the removal of the carcasses of dead animals from the streets of the city of St. Louis.

Be it ordained by the City Council of the City of St. Louis

Section 1. It shall be the exclusive privilege and duty of the River Rendering Company of St. Louis, for a period of eight years from and after the passage of this ordinance, to remove out of the city and beyond the jurisdiction of the board of health, as now or as may be hereafter established, the remains and carcasses of every dead horse, mare, mule, ox, steer, cow, ass, hog, goat, dog or other animal, (within ten hours after a report shall be made to the said River Rendering Company by the chief of police, or any authorized agent of the board of health, and appropriate them to their own use), observing every care, and using the utmost precaution that the carcasses of said animals be conveyed away in the most inoffensive manner possible, causing them to be covered with tarpaulins or otherwise. The drivers of the teams conveying away said carcasses shall not stop on their way unless detained by some unforeseen accident, under a penalty of not less than five nor more than twenty-five dollars for each offense, which fine shall, upon the conviction of any driver or drivers of such teams, be recovered and enforced as other fines before the police justice.

Section 2. The River Rendering Company shall cause to be removed and placed upon a receiving boat or boats of suitable size, strength and dimensions, all carcasses and remains of dead animals mentioned in section 1 of this ordinance, within six hours after a report shall be made to said River Rendering Company, in conformity with the provisions of said section 1; and no rendering or manufacturing upon such receiving boat or boats shall be done inside the city limits, and only in such manner and in such place as may be designated by the board of health, and so that no nuisance may be created thereby; provided, however, that during the winter months, when the river is blocked with ice, such steam rendering or manufacturing may be done in such manner, in such place, and at such hours as may be designated by the board of health.

Section 3. The River Rendering Company shall, before being authorized to perform the duties and enjoy the privileges granted by this ordinance, execute to the city of St. Louis a bond, with good and sufficient securities, in the sum of $5,000, to be approved by the mayor, and filed and preserved in the office of the city register, conditioned for the faithful and punctual performance of the duties imposed by the provisions of this ordinance.

Section 4. It shall be the duty of the police department to notify the River Rendering Company, their officers or agents, of the whereabouts of every animal carcass which they may find, or of the existence of which, within the city limits, they may be informed, as soon as possible, and within six hours of their being so notified, it shall be the duty of said River Rendering Company to remove the same in the manner specified in section 1 of this ordinance; and, upon the failure of said company to so remove the carcass of any dead animal within the time so specified, the manager or chief officer thereof shall be subject to a fine of $10, for the first offense, and for every subsequent offense $20, to be recovered as other fines before the police justice.

Section 5. The River Rendering Company, or any person, co-partnership of persons, or corporation who shall remove the carcass or carcasses of any dead animal or animals, not slain for the purpose of human food, shall give a bond of $5,000 as a guaranty that none of the product of any carcass specified in section 1 of this ordinance shall be employed or utilized for purposes of human food, and that all grease and other products rendered or manufactured or packed for use or transportation to or from market in the city of St. Louis or elsewhere, shall be branded with a burning brand, as follows: "Product of dead animals, St. Louis."

Section 6. Hereafter it shall not be lawful for any person, co-partnership of persons or corporation, except the River Rendering Company, to remove the carcasses of any dead animals as specified in this ordinance, without first having obtained a permit so to do from the clerk of the board of health, said permit specifying the date when and the person to whom issued, the kind of animal or carcass to be removed, the place to and from which the same is to be taken, and the character of the products to be derived from the same.

Section 7. The River Rendering Company shall have free use of the levee for receiving boats provided for in section 2 of this ordinance, at not less than two suitable places, one of which shall be near the northern and one near the southern portion of the city, such places to be designated by the city engineer with the approval of the board of health.

Section 8. Any failure of the River Rendering Company to comply with or fulfill any of the provisions of this ordinance, or when so reported to the city council by the board of health; and upon the recommendation of said board of health, this ordinance may be amended, altered or repealed.

Section 9. The River Rendering Company, at the time of filing the bonds provided for in sections 3 and 5 of

this ordinance, shall also file their written acceptance of the provisions of this ordinance.

Section 10. Any person or persons violating any of the provisions of this ordinance shall be adjudged guilty of a misdemeanor, and on conviction thereof, before the police justice, shall be fined in a sum not less than ten nor more than fifty dollars for each offense.

The plaintiff's petition alleges that in 1876 it accepted the privileges and duties conferred and imposed upon it by said ordinance, and executed the bond required, and provided all the necessary boats and other means for rendering the carcasses and remains of dead animals from said city: that on the — day——, 1878, defendant, without having any permission to do so from the board of health of said city, and in violation of said ordinance, began to remove the carcasses of dead hogs and other animals, not slain to be used for human food, from said city and beyond the jurisdiction of the said board of health. The answer alleges that defendants are engaged, in St. Clair county, Illinois, in rendering the carcasses of dead animals into grease, bone-black, etc., and purchase such animals in Illinois, and at the Union Stock Yards in St. Louis; that they do not purchase, remove or interfere with such as die in the city of St. Louis and are abandoned by the owners, but only such as are shipped by railroads and boats into said stock yards, and not abandoned, and claimed and possessed by the owners, and that they immediately remove them to their factory in Illinois; that they only claim and have only exercised the right to purchase them from their owners, and to remove them immediately to their factory so that they cannot possibly become a nuisance within said city, and that in no other manner have they ever interfered with any dead animal owned, purchased or possessed by plaintiff, or abandoned by its owner. The cause was determined on the petition and answer. And on the allegations therein, together with an admission that the Union Stock

Yards were within the limits of the city of St. Louis, the perpetual injunction was granted.

Many constitutional questions are discussed in the briefs of counsel and in the opinion delivered by the court of appeals, but we shall notice but one of those questions, because the views we entertain in relation to it, will dispose of the case.

If the ordinance is to be construed as authorizing plaintiff to seize and appropriate to its own use, or otherwise dispose of such property as is described in defendants' answer, in the manner provided by the ordinance, it is, in our judgment, clearly in conflict with several provisions of our State constitution. Section 20, of the Bill of Rights, declares: "That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches, etc., and that whenever any attempt is made to take private property, for a use alleged to be public, the question whether the contemplated use be really public, shall be a judicial question, and as such judicially determined, without regard to any legislative assertion that the use is public."

Section 30 declares: "That no person shall be deprived of life, liberty or property without due process of law."

Section 21. "That private property shall not be taken, or damaged, for public use without just compensation," which is to be ascertained, "by a jury or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law."

We do not deny that the general assembly may confer upon municipal authorities, the power to abate nuisances, and to declare what shall be deemed nuisances, but the latter power cannot be so absolute as to be beyond the cognizance of the courts to determine whether it has been reasonably exercised in a given case or not. *Gates v. Milwaukee*, 10 Wall. 497. The ordinance in question cannot

be maintained as a police regulation. It can never be necessary to take from one man his property and give it to another, until the property is in such condition that it is, or is so used that it is likely to become a nuisance; and even in the latter case, until it has become a nuisance, an opportunity should be given the owner to change the use, or make such disposition of his property as will prevent the apprehended danger. Or the city might, as a sanitary measure, by ordinance authorize the seizure and sale of dead animals by its proper officers, in order to prevent an improper sale or disposition of them by the owner, provided it secured to such owner the proceeds of such sale. This might be tolerated, but it would be on the very verge of debatable ground.

By this ordinance, as construed by the two courts which have passed upon it, the property of A in his dead hog or bullock is transferred to B, without the intervention of courts or juries, and with no formality whatever, except a notice from the police department of the city, that the hog or bullock is dead, and is to be found at a given place, which may be on the owner's premises in his own possession. The ordinance does not declare that all dead animals found in the city, not killed for human food, are nuisances, and if it did such a provision could not be upheld. A dead hog, or steer or sheep is not *per se* a nuisance. It was so ruled by the New York court of appeals in *Underwood v. Green*, 42 N. Y. 140. It was there observed that: "A dead hog is not *per se* a nuisance, even though it died of suffocation, and is not necessarily dangerous to public health. The owner may still put it to a useful and innocent purpose." While a dead animal is not *per se* a nuisance, it may become so, and the city, under her charter, may pass such ordinances as are necessary to prevent it from becoming a nuisance, but she must in such legislation, pay a proper regard to the rights of the owner of such property.

The death of a domestic animal does not terminate

the owner's property, and while he may be required to make such use or disposition of the carcass as will prevent a nuisance, stench or other inconvenience to the neighborhood, the municipal authorities cannot arbitrarily deprive him of his property by giving it to another. If not *per se* a nuisance, it is property in the broadest sense of the term, and all the provisions of our constitution above quoted apply to it. If the ordinance bear the construction placed upon it by respondent, we are clearly of the opinion that it was not competent for the legislature to confer authority upon the city of St. Louis to pass it.

A similar question was passed upon by this court in *Lowry v. Rainwater*, 70 Mo. 152, and we there held an act of the legislature of this State unconstitutional which authorized the acting president of the board of police commissioners of the city of St. Louis, on his own knowledge or information that there was a prohibited gaming table, or other gaming device, kept or used in the city, to issue his warrant to an officer of the police force, to seize such table or device and bring it before him to be publicly destroyed by burning or otherwise. It was contended that this act was valid, as a police regulation, but the court held otherwise, and that decision is in line with adjudications in Massachusetts, 1 Gray 1; Michigan, 4 Mich. 126; Vermont, 27 Vt. 318, and other states. It is not to be denied that other respectable courts have held the contrary doctrine, but that announced by this court, following the decisions in the states above named, is more just and reasonable, and more in consonance with the genius of republican government.

If such an ordinance as the one in question be upheld, then all our constitutional provisions for the protection of property rights are meaningless and worthless.

The judgment is reversed and the cause remanded. All concur.

DEAN *et al.*, *Appellants*, v. BITTNER.

1. **Land Titles.** The act of congress of April 29th, 1816, for the confirmation of certain land claims in Louisiana and Missouri, passed to the confirmee the legal title to land confirmed by the report of Recorder Bates, dated February 2nd, 1816.
2. **Presumption of Death from Absence.** There is no presumption of law that a man who disappeared at an unknown date in the year 1809, was dead on the 29th day of April, 1816.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

This was an action of ejectment brought by Mrs. Virginia Christy Dean and her husband, to recover an undivided interest in United States survey 1,927. Mrs. Dean claimed by inheritance from Leon N. St. Cyr. Defendant claimed through a regular chain of conveyances from Hyacynth St. Cyr, father of Leon. He also relied on the statute of limitations, he and his grantors having been in possession continuously since 1826. Leon N. St. Cyr left his father's house about the year 1809, and was never heard of again. He was supposed to have been drowned in the Mississippi river. On December 28th, 1799, Leon N. St. Cyr presented a petition to Delassus, lieutenant governor of Upper Louisiana, praying for a grant of 400 and some odd arpents, on which a concession of 409 arpents was made in conformity to a survey of Soulard, made March 12th, 1802, under the order of Delassus. On July 16th, 1810, a claim was preferred before the board of commissioners appointed to adjust land claims in Missouri Territory, for confirmation of this claim of Leon N. St. Cyr. Testimony was heard and the claim was rejected. 2 Am. State Papers, 455, 456. On the 2nd of February, 1816, Frederick Bates, recorder of land titles for the Territory of Missouri, made a report to congress, the second part of which contains, as it states, "Confirmations of concessions,

orders or warrants of survey, principally under act of congress of 12th of April, 1814." In this part of the report appears the following entries, (3 Am. State Papers, p. 298):

Concession warrant or order of survey, . .	C. D. Delassus, Lieu't Go'r.
Survey	January 3, 1802.
Claimants, ...	Leon N. St. Cyr.
Land claimed, ...	409 Arpents.
Situation, ...	Maline, St. Louis County.
Acts of ownership, . . .	Possession from 1803.
Opinion of Recorder, . .	Confirmed 400 Arpents.

These facts and others not necessary to be noticed appearing, at the trial, defendant had judgment, from which plaintiffs appealed to the St. Louis court of appeals and thence to this court.

Henry H. Denison for appellants.

M. Kinealy for respondent.

Hough, C. J.—In the second part of the general report of Frederick Bates, recorder, made February 2nd, 1816, entitled as follows: "Report of the opinions of the recorder of land titles for the Territory of Missouri, etc.: Confirmations of concessions, orders or warrants of survey, principally under act of congress of 12th of April, 1814," the claim of Leon N. St. Cyr for 400 arpents, appears as confirmed. 3 Am. State Papers, pp. 275, 298. We are of opinion that this claim is included in those confirmed by the act of 29th of April, 1816, and described in the second section of that act, as follows: "All claims embraced in the reports of the recorder of land titles acting as commissioner for ascertaining and adjusting the titles and claims to lands in the Territory of Missouri, dated November 1st, 1815, and February 2nd, 1816, where the decision of the commissioner is in favor of the claimants, shall be, and the same are hereby confirmed, to-wit: Confirmations

of village claims under the act of congress of 13th June, 1812; grants of the late board of commissioners appointed for ascertaining and adjusting the titles and claims to lands in the territory of Missouri extended by virtue of the act of March 3rd, 1813; grants and confirmations under the several acts of congress, commencing with the act of June 13th, 1812." By the very terms of this act the legal title passed to the confirmee without the aid of a patent. *Aubuchon v. Ames*, 27 Mo. 93; *Langlois v. Crawford*, 59 Mo. 456.

There is no presumption of law that St. Cyr, who disappeared at an unknown date in 1809, was dead at the date of the passage of the act of April 29th, 1816; and if there were, we are of opinion that the act of 1816 passed the title to his legal representatives.

The legal title having passed from the government in 1816, and the defendant, and those under whom he claims, having been in the actual, open, visible and adverse possession of the premises sued for since the year 1826, the action of the plaintiff is barred by the statute of limitations, and the judgment of the court of appeals will be affirmed. The other judges concur.

THE STATE v. WOOLAVER, *Appellant.*

Carnal Knowledge of Infant Female by her Protector: INSTRUCTIONS. There can be no conviction under the statute against carnal knowledge by a man of a female under the age of eighteen years confided to his care and protection, if the act was accomplished by force; and an instruction which loses sight of this distinction is erroneous, but if there is no evidence of force in the case, the error is harmless and will be no ground for reversal.

Appeal from Jasper Circuit Court.—Hon. M. G. McGregor, Judge.

Affirmed.

The prosecuting witness, who was defendant's step-daughter, testified that defendant had had connection with her twice, the first time when she was between thirteen and fourteen years of age, the second time a year later; and that on the first occasion she resisted but defendant forced her. According to her statement, the act was committed the first time about daylight in the morning in defendant's house, a house consisting of a single room fourteen feet square, in which were two beds, one occupied by defendant's wife and two children, the other by the witness and her two sisters. On the other occasion it was committed in the day time in a corn pen, witness' sister being at work just outside the pen, and her mother in the house thirty feet away. Witness did not claim to have made any outcry on either occasion.

Phelps & Brown for appellant.

D. H. McIntyre, Attorney General, for the State.

Sherwood, J.—The defendant was indicted under section 1260, Revised Statutes, for defiling a female under the age of eighteen years, his step-daughter, entrusted to his care and protection. On the trial he was convicted and the only question necessary to be considered is whether the instruction which told the jury to find the defendant guilty, if he had carnal knowledge of the girl either with or without force, is, in the circumstances of this case, such error as should cause the reversal of the judgment. The instruction was doubtless erroneous. *State v. Ellis*, 74 Mo. 385. But it could not have operated to the prejudice of the defendant; for the evidence in the case; the physical

facts testified to by the girl herself, show beyond doubt or peradventure, that the crime of rape never was committed upon her by defendant. Therefore judgment affirmed. All concur.

BULKLEY v. THE BIG MUDDY IRON COMPANY *et al.*, *Appellants.*

1. **Pleading**: "LEGAL CAPACITY TO SUE." The rule that the question of the plaintiff's legal capacity to sue must be raised either by demurrer or by answer, and if not so raised is to be deemed waived, does not apply alone to cases of infancy, coverture, lunacy and the like. It applies to all cases where the plaintiff though having an interest in the subject of the suit and the relief demanded, does not show a right to appear in court and demand such relief in his own name.
2. **Case Adjudged**: CORPORATION: ACTION AGAINST DIRECTORS FOR FRAUD. Where the petition in a suit brought by a stockholder against certain directors of a corporation for a fraudulent breach of trust in dealing with the corporate property, failed to show either that the corporation had refused to sue or that it was under the control of the defendant, but no objection was made on that score until the case reached this court, *Held*, that it could not then be sustained, though if made in time it would have been.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

George A. Castleman, *H. I. D'Arcy* and *George A. Madill* for appellants.

S. M. Smith and *P. C. Bulkley* for respondents.

HOUGH, C. J.—The only question raised in this court and not raised in the circuit court, which can be considered by us, is whether the petition in this case states facts sufficient to constitute a cause of action. The suit is brought by a stockholder for an account and recovery of

the value of his stock, alleged to have been rendered worthless by a fraudulent breach of trust on the part of the directors of the Big Muddy Iron Company in which he had stock. It is contended for the appellants, that inasmuch as it is not alleged in the petition, that the corporation has refused to sue, or that the parties to be sued are in control of the corporation, thereby excusing a request to the corporation and a refusal by it to sue, the petition fails to state a cause of action.

It is well settled that the right to sue for breaches of trust by the directors of a corporation, resulting in injury or loss to the stockholders, is primarily in the corporation, and it should appear from the facts stated in a petition filed by a stockholder, that a right to maintain an action for the wrong and injury set forth in his petition, has accrued to him either by reason of the refusal of the corporation to sue, or because the parties to be sued are in control of the corporation. *Brewer v. Boston Theatre*, 104 Mass. 378; *Heath v. Erie R'y Co.*, 8 Blatchf. 347. But it may well be doubted whether the absence of allegations showing the right of the plaintiff to sue, can be taken advantage of for the first time in this court. The petition, of course, must set forth the facts showing a liability on the part of defendants to an action, but if it fails to set forth all the facts showing that the plaintiff is the proper party to maintain such action, it would seem that under the provisions of our practice act, an objection to the petition based upon such failure should be taken either by demurrer or answer, and if not so taken, it will be deemed to have been waived by defendants. Our statute provides that the defendant may demur to the petition when it shall appear on the face thereof, "that the plaintiff has not legal capacity to sue." R. S., § 3515. And if such fact does not appear upon the face of the petition, such objection may be taken by answer, and if no such objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same. The decisions as to the meaning of the phrase

"legal capacity to sue," have not been uniform in the various states having codes containing the provision above quoted. Legal incapacity to sue, may arise, it is said, from some personal disability of the plaintiff, or from the fact that he has no title to the character in which he sues. Bliss on Code Plead., § 407. An example of the latter class is to be found in *Fuggle v. Hobbs*, 42 Mo. 537, where the plaintiff failed to aver the facts showing his right to sue in a representative capacity, and this court held that as no objection was made either by demurrer or answer, the objection was waived. In some states it is held that the phrase quoted relates only to a legal incapacity, such as infancy, coverture, lunacy and the like. 31 Ind. 315; 11 Kas. 147. But the better opinion would seem to be, that it applies to all cases where the plaintiff, though having an interest in the subject of the suit and the relief demanded, does not show a right to appear in court and demand such relief in his own name. Bliss Code Plead., § 408; *State to use Saline Co. v. Sappington*, 68 Mo. 454. Under this view of the statute the petition is sufficient after judgment, and it is unnecessary for us to examine the facts stated in the petition to see whether they are sufficient to excuse the absence of an allegation that the corporation had refused to sue.

As to the merits of the controversy, we are of opinion, after an extended examination of the record and briefs of counsel, in connection with the opinion of the court of appeals, that no such error has been committed by the circuit court or the court of appeals as would warrant us in reversing the judgment. Some of the statements and inferences of the court of appeals may perhaps be subject to criticism, but believing that substantial justice has been done, we affirm the judgment. The other judges concur.

On Motion for Rehearing.

PER CURIAM.—The petition in this case is as follows:

"Plaintiff states that the above named defendant, the Big Muddy Iron Company, is, and has been since the early part of April, 1872, a corporation duly incorporated under the laws of the State of Missouri; that the common stock of said company consists of 1,570 shares, the par value of which is $2 each; that early in the month of May, 1872, said company became duly authorized to issue preferred stock to the amount of five hundred shares; that the par value thereof was $100 each; that only two hundred and ninety shares thereof were sold; that plaintiff was and still is the owner of 100 shares of common stock and thirty shares of the preferred stock, all of which was fully paid up; that the company was doing a very prosperous business up to the 1st day of January, 1873, and had accumulated as profits, between said time of its organization and the 1st day of January, 1873, upwards of $60,000, besides an ore contract with the Pilot Knob Iron Company, and contracts with other companies, worth on said 1st day of January, 1873, the sum of $20,000; that said defendants, the Big Muddy Iron Company, and Thomas O'Reilly, James E. Mills, Thomas J. Whitman, Richard D. Lancaster, Andrew A. Blair, Benjamin White and William Wise, as directors of said company, on said 1st day of January, 1873, corruptly and fraudulently sold all the assets of said company, except the manufactured pig-iron on hand, to the Big Muddy Iron Company, also claiming to be a corporation duly incorporated under the laws of the State of Missouri, and organized, as claimed, but a few days before the date of said sale, a majority of the stockholders and directors of said last mentioned company being also stockholders and directors of said defendant, the Big Muddy Iron Company; that the price for which said assets were sold, as aforesaid, was $156,000, when in fact, said assets at that time were well worth $250,000, which was well known to all the defendants herein when they made said sale for said price of $156,000; that said sale was made against the remonstrance and protest of plaintiff made to all of said

defendants, and in fraud of the rights of the stockholders of said defendant, the Big Muddy Iron Company, and especially in fraud of the rights of plaintiff, and that all said defendants well knew it to be such fraud; that by reason of said corrupt and fraudulent sale, said stock of plaintiff, both common and preferred, became, and have ever since been, unsalable and worthless, although prior to said sale it was very valuable; that defendants, nor either of them, ever paid plaintiff for his said stock, common or preferred, or any part thereof, although often demanded; that the net profits of said defendant, the Big Muddy Iron Company, on hand on said 1st day of January, 1873, amounted to $80,000; that defendant, said Big Muddy Iron Company, has no assets. Plaintiff therefore prays the court to require said defendants to account to plaintiff for the value of the assets on said 1st day of January, 1873, sold as aforesaid, and to pay such sum as may be found due him on account of said stock held or owned by him, as aforesaid, in said Big Muddy Iron Company, and wrongfully and fraudulently converted and appropriated by defendants, as above set forth; and for such other and further relief as the court may see just and proper."

The answer is as follows: "The defendants, except the Big Muddy Iron Company, for answer, deny each and every allegation in plaintiff's petition."

The estoppel and laches relied upon by the defendant in this court, not having been pleaded, could not be considered by us. We stated as much in our original opinion.

The other points made were not overlooked, but they were not discussed, inasmuch as, in affirming the judgment of the court of appeals on the merits, we acted under the provision of the act of the general assembly of March 26th, 1881.

THE STATE v. ADDINGTON, *Appellant.*

1. **Oleomargarine**: CONSTITUTIONAL LAW. The act prohibiting the manufacture or sale of oleomargarine or any other article in imitation of butter or cheese, is constitutional. Acts 1881, p. 120.
2. **Inter-State Commerce**: CONSTITUTIONAL LAW. State enactments which have the effect of regulating commerce between the states are not obnoxious to that provision of the constitution of the United States which declares that "Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes," unless they conflict with regulations on the same subject prescribed by congress.
3. **Constitutional Law**: POLICE POWER. Defendant being prosecuted under the act prohibiting the manufacture and sale of oleomargarine, by way of establishing his point that the act was not a proper exercise of the police power, and was, therefore, unconstitutional, offered to show that oleomargarine was wholesome as an article of food. *Held*, that this offer was properly rejected. The constitutionality of the act could not be tested in that way.
4. ———: ACTS OF THE LEGISLATURE ARE PRIMA FACIE VALID. Though the State cannot under the guise of the police power overthrow the rights which the constitution guarantees, yet the legislature may do many things in the legitimate exercise of that and other powers, which, however injudicious they may be, are not obnoxious to the objection of being beyond the scope of legislative power. In all cases the courts presume that acts of the legislature are constitutional. The burden is upon him who alleges the contrary to prove it beyond a doubt.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Defendant was prosecuted for selling oleaginous substances known as "oleomargarine" or "suine," in violation of the act of March 24th, 1881. The act is entitled "An act to prevent the manufacture and sale of oleaginous substances, or compounds of the same, in imitation of the pure dairy products," and provides that "whoever manufactures, out of any oleaginous substances, or any compounds of the same, other than that produced from unadulterated milk or cream from the same, any article designed to take

the place of butter or cheese, produced from pure, unadulterated milk or cream of the same; or whoever shall sell or offer for sale, the same as an article of food, shall, on conviction thereof, be confined in the county jail not exceeding one year, or fined not exceeding $1,000. or both." Acts 1881, p. 120.

On the trial it was agreed that defendant sold to the prosecuting witness in the city of St. Louis, on the 1st day of November, 1881, one original package of an oleaginous substance or compound other than that produced from unadulterated milk or cream from the same, bearing a general resemblance to butter, and sold as an article of food; that said package was sold as "suine" or "oleomargarine," and was branded as such; that there was no pretense that the same was butter; that "suine" is known to the trade to be substantially the same thing as "oleomargarine," and is produced by the same process; that said article was manufactured in the state of Illinois and shipped to defendant in this city.

The defendant offered the testimony of a chemical expert to the effect that he had made a comparative analysis of the article sold with pure dairy butter; that the product sold is in all respects as healthful and nutritious as pure butter, and is not more liable to adulteration or deception; that it will keep as well as pure butter, and, from a sanitary point of view, is in all respects as harmless and desirable a commodity as pure butter. This testimony was excluded by the court on the ground that it was incompetent and immaterial, and defendant excepted. Defendant was convicted and appealed.

Lyne S. Metcalfe, Jr., and *Franklin Ferriss* for appellant.

The title of the act does not purport to be a police regulation. The legislature makes no such claim. Laws of this character are generally entitled acts to protect pub-

lic health, morals, etc. It is for the court to say whether the legislature has exceeded its police power. To hold that the legislature may determine what is the limit of its police power is to remove all limit to legislation and all protection from the citizen, and in this respect a police regulation ostensibly for the protection of the public, stands on no better footing than an unqualified arbitrary enactment. The specious pretense of a police regulation may be used to cover an arbitrary system of legislation utterly destructive to private rights, and the plainest limitations of the constitution thereby removed; because there is no private right, even that to life and liberty, but must be surrendered if the public good demands it. The constitution must be inoperative, unless some power resides outside the legislature to hold it in obedience to the constitution, and this must be as true of police regulations as of other laws. The courts have not failed to recognize this doctrine. The court will not sanction an unreasonable exercise of the power to make police regulations. *State v. Fisher*, 52 Mo. 174; *County Ct. of St. Louis Co. v. Griswold*, 58 Mo. 193. If the legislature prohibits that which is harmless in itself, it would be an unauthorized exercise of power, and it would be the duty of the court to declare such legislation void. *T. W. & W. R. R. Co. v. Jacksonville*, 67 Ill. 37; *People v. P. R. Co.*, 9 Mich. 309; *Lakeview v. Rose Hill Cem. Co.*, 70 Ill. 191; *Munn v. People*, 69 Ill. 80; *Yeazel v. Alexander*, 58 Ill. 254; *Railroad Co. v. Husen*, 95 U. S. 473. Neither can the legislature assume a police power by declaring the thing sought to be prohibited a nuisance. *Beebe v. State*, 6 Ind. 514.

We do not question the power of the legislature to prevent the adulteration of food, or deception of any kind in its preparation. Any law which compels those who deal in artificial butter to brand it as such, or which makes it a misdemeanor to sell it as the genuine article, will be proper, and, we assert, effective; but we do object to a law which positively forbids the manufacture and sale of an

article which from its description in the statute does not appear to be injurious, and which we offer to prove is a positive benefit to the State.

This is not a question of regulation but of prohibition, and such prohibition can be justified if at all on one of two grounds. First, that the article is of such a nature that deception and fraud must inevitably result from its use to the injury of the health or morals of the community. Or secondly, that there exists in the community a prejudice against the use of this article, which prejudice the legislature and courts are bound to respect.

The first argument assumes that the article is injurious and that its use even knowingly would be injurious. This we deny, and offer to prove the contrary, and it is practically conceded both by the respondent and court below that such is not the fact. The tendency to deception is no greater than it is in numerous articles of daily consumption. Who will claim that the legislature can guard against every species of deception? The constitutional grant of life, liberty and fruits of industry must necessarily result in some danger to other members of the social body. No power on earth can secure the fullest measure of individual liberty and at the same time perfect immunity from danger.

If this artificial article is in its use injurious to public health, it must be far different from the genuine article in its constituents and effects, and can be detected by experts and guarded against by inspection laws. If it is so similar in appearance, taste, smell and constituent elements that the difference cannot be detected, the deception cannot be a very dangerous one.

The second argument seems to be the one on which the court below rests its opinion. In the first place there is no proof of the fact that a prejudice exists, and we contend that the court cannot assume judicial knowledge of such fact even if it does exist. Further, we say that an act of the legislature prohibiting the manufacture and sale

of an article cannot be justified upon the sole ground that a prejudice exists against it, especially in view of the fact that the article is healthful and uninjurious, and such a prejudice is, therefore, unreasonable, and results from ignorance. Artificial butter, which by this act is prohibited, is as wholesome and uninjurious as dairy butter. Both are composed of the same elements in slightly varying proportions, and both mainly composed of pure animal fat. The artificial butter is as healthy and nutritious as dairy butter, is no more liable to adulteration or deception, and is in all respects as harmless and desirable an article. There is no question but that this process of making butter from pure animal fat is one of the greatest discoveries of the age. By the application of science the cost of producing an article of food is greatly lessened, and this article is one of universal use and necessity. The secret is simply this: both dairy butter and artificial butter are composed in the main of pure fat, which undergoes no chemical change in the butter process. In the one case the fat from the animal passes into the milk at the natural temperature of the body in small globules which afterwards rise to the surface forming the cream which is churned into butter. In the other case the proper butter fat is separated by a scientific process from the natural fat into oleo oil, which, like the cream, is churned into butter, the change in both cases being mechanical and not chemical; and thus it appears that both products are substantially the same See offer of proof; see also Encyclopædia Britannica, Title "Butter;" Johnson's Universal Cyclopædia, same title. See also the Scientific American, supplement No. 322, March 4th, 1882, page 5153. These authorities show that the making of the article sought to be prohibited is a valuable industry and not an evil, which requires the interposition of the police powers of the legislature.

The act is unconstitutional because it interferes with inter-state commerce, by not distinguishing between articles manufactured in this State and those imported. *Brown*

v. Maryland, 12 Wheat. 439; *Railroad Co. v. Husen*, 95 U. S. 473.

D. H. McIntyre, Attorney General, for the State.

1 The evidence offered by defendant was properly excluded. By the agreed statement of facts the defendant was guilty of a violation of the law, and if the act was constitutional, was liable to the penalty it imposed. The evidence offered did not go to prove the act unconstitutional, and was, therefore, incompetent and immaterial to the issues on trial. It would have been very proper evidence to lay before the legislature while deliberating upon the passage of the act, but was not pertinent to the inquiry into defendant's guilt or innocence upon the charge.

2. This act is but the reasonable exercise of the police power of the State. It has always been conceded that the State has the right to make and enforce laws regarding the adulteration of articles of food, and this act comes under that class of laws. It makes no difference that it may be the testimony of experts that the oleaginous substances against which this act is directed are palatable and wholesome as articles of food. While such may be the case, the manufacture of such compounds from deleterious substances is liable to be engaged in to a great extent, and the close resemblance of these substances to genuine butter renders it easy for dealers in such to impose upon persons by selling to purchasers the spurious for the real article. These facts taken in connection with the almost universal prejudice against the use of these compounds, make their manufacture and sale within this State injurious to the general comfort, if not the health of its citizens, and, therefore, the fit subject of police regulations, even to the entire prohibition of their manufacture and sale. *Thorpe v. R. R. Co.*, 27 Vt. 149.

3. Whether the law is satisfactory or not, is a matter addressed exclusively to the wisdom of the legislature. It

may not only prohibit the manufacture of these substances, but may prohibit the sale of those on hand at the time of the passage of the act, and not thereby render the act obnoxious to any constitutional provision. Cooley Const. Lim., (3 Ed.) 581, 582, 583.

SHERWOOD, J.—The opinion of the St. Louis court of appeals, per Thompson, J., so thoroughly and ably considers the subject presented by this record, that we might well forbear doing more than to give that opinion our entire approval. We have thought best, however, to offer one or two additional suggestions which we deem pertinent.

I.

And first as to the objection that the statute is unconstitutional because violative of the provision of the constitution of the United States that "The congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes." To this objection, in addition to the reasons so well urged on this point by the court of appeals, may be mentioned this one: That it does not appear that congress has passed any law to regulate commerce in "oleomargarine" or "suine" between the states, and of consequence the act under discussion cannot be obnoxious to the charge of being in contravention of that provision of the constitution of the United States relied on by the defendant; even if the act, on which the indictment is bottomed, be regarded as one which has the effect of regulating commerce between the states. Such regulations by the states are valid in so far as concerns the constitutional provision we have quoted, except when conflicting with regulations on the same subject prescribed by congress. *License Cases*, 5 How. 504; Cooley Const. Lim., 581 *et seq.*, and cases cited.

II.

Relative to the offer of defendant to prove that the

article he sold was wholesome as an article of food, the testimony, as adjudged by the trial court, was wholly irrelevant. The position of the defendant in substance is, that if the wholesomeness of the article as one of food, could be established, that thereby the constitutionality of the act which forbids its sale would be overthrown. This is clearly a *non sequitur*. Such a position, if pushed to its logical conclusion, would utterly overthrow the exercise of the police power by the State; overthrow every law the wisdom of which could not bear the test of scrutiny. Proceeding on such a theory, a man arrested for killing game at an unlawful season, might appropriately offer to prove that the birds killed were injurious to the public or were destructive to crops. Or, made to submit to sanitary regulations, might claim that there was no disease on board his ship, and, therefore, the law which compelled him to remain at quarantine, was an arbitrary infringement of his constitutional rights.

We may make the broad concession that a state cannot, under the disguise of the police power, overthrow the rights which the constitution guarantees; but notwithstanding this, it cannot be gainsaid that the legislature may do many things in the legitimate exercise of that and other powers, which, however unwise or injudicious they may be, are not obnoxious to the objection of being beyond the scope of legislative authority. It would be exceedingly difficult, if not impossible, to state, beforehand, what, in a number of cases, should be regarded as an assumption by the legislature of powers not warranted by the constitution. Each case, to a certain extent, must be determined by its own circumstances, the court, in every instance, regarding the act to be investigated as *prima facie* constitutional. "The right of the judiciary to declare a statute void and to arrest its execution, is one which, in the opinion of all courts, is coupled with responsibilities so grave, that it is never to be exercised except in very clear cases; one department of the government is bound to presume

that another has acted rightly. The party who wishes us to pronounce a law unconstitutional takes upon himself the burden of proving beyond doubt that it is so." *Erie & N. E. R. R. Co. v. Casey*, 26 Pa. St. 287.

The central idea of the statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine article so closely in its external appearance, as to render it easy to deceive purchasers into buying that which they would not buy but for the deception. The history of legislation on this subject, as well as the phraseology of the act itself, very strongly tend to confirm this view. If this was the purpose of the enactment now under discussion, we discover nothing in its provisions which enables us, in the light of the authorities, to say that the legislature, when passing the act, exceeded the power confided to that department of the government; and unless we can say this, we cannot hold the act as being anything less than valid.

For these reasons, as well as for those stated by the court of appeals, we affirm the judgment. All concur, except HOUGH, C. J., who is of opinion that the judgment of the court of appeals should be reversed.

THE STATE v. SANDS, *Appellant.*

Criminal Law: INSTRUCTIONS. An instruction over-stated the maximum fine and omitted to state the minimum term of imprisonment for defendant's offense. The punishment assessed by the jury was within the limit prescribed by law both as to fine and imprisonment. *Held*, nevertheless, that for the error in the instruction the judgment of conviction must be reversed.

Appeal from Johnson Circuit Court.—The case was tried before A. S. RODGERS, ESQ., sitting as Special Judge.

REVERSED.

Levin H. Campbell and *Samuel P. Sparks* for appellant.

D. H. McIntyre, Attorney General, for the State.

NORTON, J.—Defendant, at the December term, 1879, of the Johnson county criminal court, was tried upon an indictment charging him with abandoning and failing to provide for and maintain his wife from the 18th day of July to the 16th day of December, 1878. He was convicted and his punishment assessed at a fine of $325 and imprisonment in the county jail for 143 days.

The indictment is based on the 34th section, 1 Wagner's Statutes, 497, which provides that "every husband shall be deemed guilty of misdemeanor, who shall, without good cause, abandon his wife, and fail, neglect or refuse to maintain and provide for her." The punishment on conviction for such offense under the law in force at the time the indictment was found, was by fine not less than $50 nor more than $500, or by imprisonment in the county jail or workhouse not less than one month nor more than twelve months, or by both such fine and imprisonment.

The court erred in the first instruction given on behalf of the State in this, that the jury was directed to assess the punishment "at imprisonment in the county jail not more than one year, or by a fine of not less than $50 nor more than $1,000, or by both such fine and imprisonment." It will be observed that in the same instruction as to the punishment by imprisonment the minimum prescribed by the statute as a basis in fixing the punishment was wholly ignored, and the maximum of the fine was greater than that allowed by law. Judgment reversed and cause remanded in which all concur.

THE STATE v. ROLLER, *Appellant.*

1. **Statute**: IMPLIED REPEAL BY REVISION. A statute revising the whole subject matter of a former statute and evidently intended as a substitute for it, although it contains no express words to that effect, repeals the former.

2. ——: ——: SALE OF INTOXICATING LIQUORS BY DRUGGISTS. The act of March 26th, 1881, "To regulate the sale of medicines and poisons by druggists and pharmacists," by implication repeals the act of May 19th, 1879, "To regulate the sale of intoxicating liquors by dealers in drugs and medicines," etc. NORTON, J., dissenting.

3. ——: ——: ——. Under the present statute druggists are prohibited from selling or giving away any alcoholic liquors as a beverage; but they may sell such liquors for medical purposes, and that without the physician's prescription required by the former act. NORTON, J., dissenting.

Appeal from Saline Criminal Court.—HON. J. E. RYLAND, Judge.

REVERSED.

Draffen & Williams for appellant.

1. By section 8 of the act of 1881, apothecaries registered as provided by the act "have the right to keep and sell, under such restrictions as are herein provided, all medicines * * of recognized medical utility." Whisky is admitted to be such a medicine. The act is a special grant to sell, not upon such terms as were prescribed by other statutes, but on such as are prescribed by this act. On these terms a special privilege is accorded to a certain class to sell liquor as medicine. This class are permitted to sell other medicines subject only to the restrictions contained in this act. Under the same restrictions they may sell whisky as a medicine. The trust spoken of by the same section is manifestly the privilege thus accorded them. If it be true that they can only sell on prescriptions of physicians, there is no trust confided in them. The trust is reposed in the physicians.

2. By section 9 it is provided: "Nor shall it be lawful for any druggist or pharmacist to retail, sell or give away any alcoholic liquors or compounds as a beverage." It must be assumed that the legislature had an intelligent purpose in that enactment, and that it was supposed that there was a necessity for it. Now, if it was intended that the act of 1879, absolutely prohibiting sales except upon a prescription, should stand, why the above provision? The act of 1879 was far more rigorous, and if it was to be continued, there was no ground for the above recited prohibition. This would seem to show that the legislature did not intend to continue in force the act of 1879, otherwise they would not, with that act prohibiting sales of intoxicating liquors except for medical purposes and upon the prescription of a physician before them, have inserted a less exacting provision upon the same subject.

3. Under the act of 1879 the sale of liquors as a medicine, but without a physician's prescription, was punishable by a minimum fine of $40, and a maximum of $200. Under the act of 1881 the sale by a druggist, as a beverage, renders him liable to a minimum fine of $25, and a maximum of $100. In other words, if the law of 1879 is in force, then the druggist who in good faith sells liquor as he does any other drug, but without a prescription, in the estimation of the legislature, ought to pay not less than $40 nor more than $200 for the offense; while if the same man sells as a beverage, the legislature only intended to fine him from $25 to $100! The man who turns his drug store into a dramshop commits a less grievous offense than the one who sells liquor as medicine under the privilege accorded him by the act of 1881. Such a result could not have been intended. The legislature evidently intended to cover in the act of 1881 the whole subject of the sale of liquors by druggists, and hence inserted the prohibition against the sale as a beverage under a penalty.

4. One of the principal objects of the act of 1881 was to throw such restrictions around the business of druggists

that only those who could pass a satisfactory examination and show that they possessed the requisite qualifications could carry on the business. It was doubtless thought that by so doing the dramshops under the guise of drug stores could be more effectually suppressed than by requiring prescriptions as prerequisites to the sale of liquor. By the act of 1881 the legislature endeavored to reach the evil by according the privilege of selling liquor for medical purposes as a trust to a class whose qualifications have been passed upon by a board appointed by the governor, and who are examined and registered; and who, for a violation of this trust, are liable to the penalties prescribed by the act. It was, doubtless, thought that more could be accomplished by the character of the men permitted to engage in the business and by the supervision provided for in the act than by restrictive statutory enactments, which had proved failures heretofore.

Davis & Willis also for appellant.

The act of 1881 covers the whole subject of the sale of liquor by druggists in the State of Missouri; and since that act is a legislation upon all the points embraced in the act of 1879. we conclude that the intention of the legislature was to substitute the latter act for the former, and to thereby repeal the same. *U. S. v. Tynen*, 11 Wall. 89, 92; *Smith v. State*, 14 Mo. 147; *Murdock v. Memphis*, 20 Wall. 590; *Towle v. Marrett*, 3 Greenl. 22; *s. c.*, 14 Am. Dec. 206.

D. H. McIntyre, Attorney General, for the State.

1. Our act of 1881 is almost a literal copy of an Iowa act approved March 22nd, 1880. 2 Miller's Code, 950. Thus, section 8 of both acts are the same except that the Iowa act contains a provision for striking the name of the offender from the register, and also these very important words "for the legitimate and actual necessities of med-

icine." Now it cannot be said that the omission of these words was by inadvertence, nor through ignorance of the effect, nor that it was without design. On the contrary, the presumption must be that the legislature knew and understood the provisions of both acts, that they carefully considered them together to ascertain what parts of the Iowa statute were adapted to the plan and purpose of the proposed act, and what parts were not so adapted. It must be presumed that they saw and understood what is patent to the most casual observation that the words above quoted, beyond question, gave the pharmacist under the said act, the right to sell for the legitimate and actual necessities of medicine, without the prescription. Iowa had no prescription provision, but licensed persons to sell intoxicating liquors for mechanical, medicinal and other purposes. Miller's Code, §§ 1526, 1555. And it must, therefore, be presumed that these words were left out because they did not agree with the laws of this State regulating the sale of intoxicating liquors. If the legislature had left them in, can there be any doubt that the prescription requirement of the act of 1879 would have been thereby repealed? Having stricken them out, can there be any more doubt that the provision was not thereby repealed and that the legislature so intended? This view of the question harmonizes with every rule of construction, and I believe it to be consonant with section 5461, Revised Statutes, which requires the laws regulating the sale of intoxicating liquors to be liberally construed as remedial in their character.

2. Granting that there is some conflict between the act of 1879 and 1881 in respect to the punishment for selling liquor as a beverage, this only shows that the earlier act is repealed to that extent, no further. It does not affect the question whether there is an irreconcilable conflict with reference to the prescription requirement.

3. If the two acts were intended to regulate the whole subject of the sale of intoxicating liquors by druggists, their titles fail to perform the office of expressing clearly

the subjects of the acts. The act of 1879 is entitled "An act to regulate the sale of intoxicating liquors by dealers in drugs and medicines; to define who shall be known in law as dealers in drugs and medicines;" not to regulate the sale of drugs and medicines. The act of 1881 is entitled "An act to regulate the sale of medicines and poisons by druggists and pharmacists." It is respectfully submitted that this act is intended to accomplish only what its title declares, to regulate the sale of medicines and poisons, as these terms are commonly understood; with incidental reference to the sale of intoxicating liquors by way of caution or warning, with the exception of the provision against giving away, retailing, etc.

4. The position that registered pharmacists may sell intoxicating liquors as medicines under no other restrictions than those contained in the act of 1881 is untenable in the face of the proviso to the 8th section of that act. "A proviso in deeds or laws is a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate or the other be exercised unless in the case provided." *Voorhees v. Bank*, 10 Pet. 449; "The proviso is generally intended to restrain the enacting clause, and to except something which would otherwise have been within it, or in some measure to modify the enacting clause." *Wayman v. Southard*, 10 Wheat. 1. Two difficulties lie in the way of the construction of the 8th section, contended for by the appellant. First, it stultifies the act, and makes it appear foolish in providing a penalty in the 9th section for the offense of selling, etc., as a beverage, since, if there can be no breach of that trust, (mentioned in the proviso,) except in the sale of such liquors otherwise than as medicines, as argued for appellant, it must follow that the sale would be as and for a beverage, and its punishment was already provided for in the 8th section. Any construction attended with this result must be erroneous, for it is the province of construction to make the statute consistent and intelligent in itself,

if possible. With the construction put upon this act, who can say what the penalty for selling as a beverage should be under the act of 1881; whether it should be ascertained by reference to the 8th or the 9th section. The second difficulty consists in the fact that it gives no meaning at all to the proviso, for the reason that it excepts nothing, does not qualify or modify the grant, and especially does it deprive the words "from the utmost rigor of the law regulating the sale of intoxicating liquors" of any meaning. What law regulating the intoxicating liquors? The law in force at the time of the passage of the act of March 26th, 1881. Had the legislature meant the "rigor" of this act, which nowhere in any specific provisions for punishment reaches the utmost rigor, instead of the use of the word law, it would have used the words, this act. It is a cardinal rule that in the construction of a statute effect is to be given, if possible, to every clause and section of it. *Att'y Gen. v. Detroit, etc., Co.*, 2 Mich. 138; *State v. King*, 44 Mo. 283; Potter's Dwarris, 189. Words are never to be construed as unmeaning and surplusage if a construction can be legitimately found which will give force to and preserve all the words in the act. *Leversee v. Reynolds*, 13 Iowa 310; *Hartford Bridge v. Union Ferry*, 29 Conn. 210.

5. It is contended that there could be no breach of the trust, except in the sale of such liquors, otherwise than as medicine, and, therefore, the sale as a medicine, without the prescription, is permitted, and hence the obvious conflict. The major premise of this proposition is wrong, as it seems to me, for it does not exhaust the reasonable and logical possibilities of the question, nor is it obviously and necessarily true that there could be no breach of the trust except in the sale of intoxicating liquors, as a beverage. It would be quite as reasonable to say that the breach would be committed in selling without the prescription, even for medical purposes. Nay, it seems to me that it would be more so, for this conclusion would harmonize the two acts and be consistent with the stringent remedial pro-

visions adopted in the legislation of this State, to restrain the sale of intoxicating liquors.

Stress is laid upon the supposition that the class of men under the act of 1881, who engage in the business of selling drugs will be superior to those formerly engaged in the same business, and more worthy of trust and confidence. This view overlooks the fact that the 4th section of the act of 1881 makes it the duty of the board to register without examination, those engaged in the business at the passage of the act. And concerning many of those, it is a notorious fact, as common as a by-word, that they were not deterred by conscience or law, from carrying on surreptitiously an unlawful traffic in intoxicating liquors under the specious pretext of doing a lawful and respectable business.

Henry, J.—The defendant was indicted for selling intoxicating liquors in less quantity than one gallon. The cause was submitted on the following agreed facts: "Defendant sold intoxicating liquor in Saline county, on the 2nd day of March, 1882, in less quantity than one gallon, for medical purposes only, but without a prescription from a physician. Defendant was at the time a duly registered pharmacist; and the liquor sold was whisky, which is pronounced by the National American and United States Dispensatory and Pharmacopœia to be of recognized medical utility." He was found guilty and fined $40, and has appealed to this court from the judgment.

The only question involved is whether the act of the legislature, approved March 26th, 1881, entitled "An act to regulate the sale of medicines and poisons by druggists and pharmacists," repealed the act of May 19th, 1879, entitled "An act to regulate the sale of intoxicating liquors by dealers in drugs and medicines, to define who shall be known in law as dealers in drugs and medicines, and to repeal an act entitled 'An act to regulate the sale of intoxicating liquors by dealers in drugs and medicines,' approved

May 2nd, 1877," appellant contending that it did, and respondent that it did not, and that druggists cannot now sell intoxicating liquors in less quantity than one gallon, except on a registered physician's prescription.

The act of 1881 establishes a "Board of Pharmacy for the State of Missouri," to be composed of three competent pharmacists, to be appointed by the governor, with the approval of the Senate, and requires every person desiring to conduct any pharmacy, drug store, apothecary shop or store for the purpose of retailing, compounding or dispensing medicines, or poisons for medical use, to undergo an examination by said board touching his qualifications to compound and dispense medicines, and, if found qualified, the board is required to give him a certificate and register his name in a book to be kept for that purpose. Persons engaged in the business of pharmacists and druggists at the date of the passage of the act were entitled to be registered without examination, provided, that if they failed to apply for registration within sixty days after being notified to do so, they should undergo the examination required of others when they did apply. By section 8, registered apothecaries "have the right to keep and sell, under such restrictions as are herein provided, all medicines and poisons authorized by the National American or United States Dispensatory and Pharmacopœia, as of recognized medical utility, provided that nothing herein contained shall be construed so as to shield an apothecary or pharmacist who violates or in anywise abuses this trust, from the utmost rigor of the law regulating the sale of intoxicating liquors." Section 9 requires the apothecary to use precautions therein prescribed in the sale of certain poisons enumerated, and declares that "it shall not be lawful for any licensed or registered druggist or pharmacist to retail, sell or give away, any alcoholic liquors or compound as a beverage," and declares the violation of any provision of the section a misdemeanor, punishable by a fine of not

less than $25 nor more than $100. Section 13 repeals all acts or parts of acts in conflict with that act.

By the act of 1879 a dealer in drugs and medicines was prohibited from selling or giving away any alcoholic liquors in any quantity less than one gallon, and in any quantity to be drunk on the premises, without having a dramshop-keeper's license, unless on the prescription of a regularly registered physician, and for any violation of the provisions of the act was punishable by a fine of not less than $40 nor more than $200.

There is an obvious conflict between the two acts, in the punishment prescribed for a violation of their respective provisions, and others equally irreconcilable in other respects though not so apparent. Each act was intended to regulate the sale of alcoholic liquors by druggists, or dealers in drugs and medicines, and the act of 1881, in addition, regulates the sale of other poisons and medicines by druggists. The act of 1879 defined a druggist to be one who "shall maintain a store, or known place of business, shall have complied with the law relating to merchants' licenses, and shall have, at all times on hand at said store, or place of business, a stock of goods such as are usually kept in drug stores, exclusive of intoxicating liquors." While the act of 1881 does not attempt to define the term "druggist," it by implication declares that no one shall be so regarded unless registered as such under its provisions, and expressly confers the privileges of druggists given by that act, upon such as register, without requiring of them the prerequisites which enter into the definition of a druggist, in the act of 1879. The act of 1879 authorized dealers in drugs and medicines to sell alcoholic liquors in any quantity less than a gallon on the prescription of a physician regularly registered, and not otherwise. It required them also, by section 2, to keep a store or known place of business, as above stated; on the conditions therein prescribed he was authorized to sell. By the act of 1881, registered druggists and pharmacists

have the right to sell medicines and poisons authorized by the Dispensatory and Pharmacopœia, under such restrictions as are imposed by that act. No restrictions imposed by other acts have application to them. The proviso to the 8th section, "That nothing contained in the act should be so construed as to shield an apothecary or pharmacist who violates or in anywise abuses the trust reposed in him from the utmost rigor of the law regulating the sale of intoxicating liquors, has not the effect to impose restrictions upon druggists other than those prescribed by that and other sections of the act. The trust mentioned in that proviso relates to the sale of intoxicating liquors. There can be no breach of that trust except in the sale of such liquors otherwise than as medicines, and that breach of the trust is by section 9 declared a misdemeanor, and punishable by a fine of not less than $25 nor exceeding $100. One restriction of the act of 1879, was as to quantity, but by the act of 1881 a druggist cannot sell alcoholic liquor as a beverage in any quantity. He is restricted to its sale as a medicine.

Both the act of 1879 and that of 1881 were intended to regulate the whole subject of the sale of intoxicating liquors by druggists. Each covers the same ground on that subject, and it was held in *Smith v. State*, 14 Mo. 152, that "A statute is impliedly repealed by a subsequent one revising the whole subject matter of the first," and Judge Ryland, delivering the opinion of the court, remarked that "a subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must on the principles of law, as well as in reason and common sense, operate to repeal the former." Citing *Bartlet v. King*, 12 Mass. 537; *Nichols v. Squire*, 5 Pick. 168; *Com. v. Cooley*, 10 Pick. 37. There is no room to doubt that the act of 1881 was intended as a substitute for that of 1879; and the time has passed when one in this State could erect a shanty at a cross-roads and keep for sale a few bottles of

patent medicines, and many bottles of adulterated whisky, and claim to be a druggist.

The judgment is reversed. All concur except NORTON, J., who dissents.

NORTON, J., DISSENTING.—Not concurring in the above opinion, I deem it proper to give my reasons for dissenting.

The only question presented by the admitted facts of the case is, whether under existing laws a druggist can sell intoxicating liquors as a medicine without the prescription of a regularly registered physician. The 3rd and 4th sections of an act entitled "An act to regulate the sale of intoxicating liquors by dealers in drugs and medicines, to define who shall be known in law as dealers in drugs and medicines," etc., make it a misdemeanor punishable by a fine of not less than $40 nor more than $200 for any such dealer to sell or give away liquors of any kind, unless the same are prescribed by a regularly registered physician. Laws 1879, p. 165. If the said statute is in force, the defendant, under the admitted facts, is guilty of violating it. It is, however, argued, and the opinion of the court so holds, that the said act of 1879 has been repealed by a subsequent statute, the title to which is, "An act entitled an act to regulate the sale of medicines and poisons by druggists and pharmacists." Laws 1881, p. 130. It is not pretended, nor is it claimed, that the act of 1881 in express terms repeals the act of 1879, but it is claimed that the latter act is repealed by necessary implication.

The rule that repeal by implication is not favored, and that before a later act can be construed to repeal a former one, the repugnancy between the two acts must be such that both cannot stand together, is so familiar that no citation of authorities is necessary to establish it. It is also a rule equally familiar that if the later and former acts can be construed so that both may be operative, such construction should be adopted. Guided by these plain

and undisputed rules, I think it is manifest that no such inconsistency exists as makes the two acts irreconcilable.

The claim that said sections 3 and 4, of the act of 1879, are so repugnant to the act of 1881 that both cannot stand, is based upon sections 8 and 9 of the act of 1881. Said section 8 is as follows: "Apothecaries registered as herein provided shall have the right to keep and sell, under such restrictions as herein provided, all medicines and poisons authorized by the National American or United States Dispensatory and Pharmacopœia, as of recognized medical utility; Provided that nothing herein contained shall be construed so as to shield an apothecary or pharmacist who violates or in anywise abuses this trust, from the utmost rigor of the law regulating the sale of intoxicating liquors." It is argued that whisky is recognized as a medicine in the United States Dispensatory, and that the section above quoted authorizes druggists to sell it as such. I grant that it does authorize the sale of alcoholic liquors as a medicine; but the act of 1879 also authorizes its sale for such purpose when prescribed by a physician. What irreconcilability is there between an authority to sell whisky as a medicine, and a direction or requirement that when it is so sold it must be prescribed by a physician? In either case it would be a sale of it as a medicine. The mere fact of requiring it to be sold when prescribed by a physician, is not a negation of the right to sell it as a medicine. Had the act of 1879 forbidden druggists to sell liquor as a medicine under any circumstances, then such a repugnancy would have existed between said act and the act of 1881 as would justify the conclusion that the act of 1879 was repealed.

But aside from this, it seems to me that the general assembly have settled the question beyond controversy by the proviso incorporated in the very section giving the right to sell, where in the most emphatic language they lay down a rule for the construction of said act of 1881, and say "provided that nothing herein contained shall be

construed so as to shield an apothecary or pharmacist who violates or in anywise abuses this trust, from the utmost rigor of the law regulating the sale of intoxicating liquors." The language of said proviso, in my opinion, forbids the construction placed upon the act of 1881 in the opinion of the court, which construction renders meaningless said proviso. It is contended that the proviso only has relation to the following provision in section 9 of the act of 1881, viz: "Nor shall it be lawful for any licensed or registered druggist or pharmacist to retail, sell or give away any alcoholic liquors or compounds as a beverage, and any person violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than $25 nor more than $100." To apply the proviso in section 8 to the above provision in section 9, would render the proviso useless and meaningless, for he reason that without it, any druggist selling liquor as a beverage, would have subjected himself under section 9 to prosecution for a misdemeanor, and a fine of not less than $25 nor more than $100.

But more than this, it is shown by the proviso that it could not be so applied, for it was not the utmost rigor of the law of 1881, (which, as I have shown, was entitled "An act to regulate the sale of medicines and poisons by druggists and pharmacists,") from which a druggist was not to be shielded for violating the trust, but for such violation he was not to be shielded by anything contained in the act of 1881 from the utmost rigor of the law regulating the sale of intoxicating liquors.

In my judgment, and according to all recognized rules of construction, there is no such repugnancy between the two acts as would justify the conclusion that the last act operates as a repeal of the former act, especially so when to make the repugnancy appear the rule of construction which the legislature directs to be applied to the latter act must not only be ignored, but a rule of construction which virtually expunges from the 8th section of the act of 1881

the proviso contained therein by applying it not to the law of 1879, which is a law regulating the sale of intoxicating liquors by druggists, but to an act regulating the sale of medicines and poisons by druggists and pharmacists. I think it apparent that the general assembly, so far from intending to repeal the act of 1879, which authorized druggists only to sell liquor when prescribed by a physician, intended to continue it in force by adding said proviso to said section 8, which is equivalent to a declaration to druggists: We give you the right to sell alcoholic liquors as a medicine, but there is a law now existing regulating the sale of intoxicating liquors by druggists, which makes it an offense to sell it as a medicine except when prescribed by a physician, and if you violate the trust by selling as a medicine without such prescription, you shall not only be subjected to the rigor but the utmost rigor of that law.

If the law is as declared by the court, all that a druggist, when indicted under the act of 1881 for selling alcoholic liquors as a beverage, will have to do to insure acquittal, will be to show that the liquor was called for as a medicine, and that he sold it as such. And if indicted under the act of 1879 for selling it as a medicine without the prescription of a physician, all that he will have to do will be to claim that under the act of 1881 he had the right so to sell it.

For the reasons given, I think the judgment ought to be affirmed.

Motion for rehearing overruled.

BRISCOE, *Plaintiff in Error*, v. CALLAHAN.

1. **Vendor's Lien**: WAIVER BY TAKING OTHER SECURITY. When a mortgage or deed of trust is taken on the land conveyed for a part of the unpaid purchase money, the vendor's lien for the remainder of such unpaid purchase money is thereby waived, unless it is expressly stated in such mortgage or deed of trust that the lien is not waived.

2. **Promise of Third Person to pay Debt of Another.** The simple acceptance, by suit or otherwise, by a third person of a promise made to pay a debt due such third person from another, will not operate to release such other person from liability to such third person on account of such debt. To extinguish the obligation of the original debtor, it must appear that the subsequent obligation was accepted in lieu of his; otherwise the second obligation will be regarded only as collateral and additional to the first.

Appeal from Lafayette Circuit Court.—HON. WM. T. WOOD, Judge.

AFFIRMED.

Wallace & Chiles for plaintiff in error.

Alex. Graves and *A. F. Alexander* for defendants in error Susan M. and A. F. Alexander.

HOUGH, C. J.—The petition in this case states, in substance, that on October 15th, 1870, Jane Briscoe conveyed by deed of trust to A. F. Alexander, as trustee, lots 5 and 6 in block 15, in the city of Lexington, to secure the payment of a note for $500, made by Briscoe Gaines to Susan M. Alexander, who was named as the beneficiary in said deed. On March 28th, 1871, Jane Briscoe conveyed to Theresa Callahan, wife of Dennis Callahan, for her sole and separate use, lot 5 above described, for the sum of $2,000, $1,000 of which was paid in cash, $500 was secured by a note of Theresa and Dennis Callahan at twelve months and a deed of trust on lot 5 aforesaid to William C. Chiles, as trustee, and in satisfaction of the remainder of said

purchase money, said Theresa and Dennis Callahan agreed by the terms of the deed of March 28th, 1871, from the plaintiff to Theresa Callahan, as well as by their parol undertaking, to pay to Susan M. Alexander the amount of the note of Briscoe Gaines, held by her, together with interest thereon. The plaintiff indorsed the note of Theresa and Dennis Callahan, for $500 to Briscoe Gaines, and Susan M. Alexander purchased the same from him, and upon default in the payment thereof, she caused said lot 5 to be sold under the deed of trust given by said Theresa and Dennis Callahan, and on February 5th, 1877, purchased the same at and for the sum of $100, and received a deed therefor from said Chiles, trustee, and took possession thereof. Theresa and Dennis Callahan became insolvent, and left the State without paying the debt due Susan M. Alexander from Briscoe Gaines, assumed by them.

The plaintiff claims that Susan M. Alexander holds said lot 5 so purchased by her under the deed of trust given to the plaintiff, subject to a vendor's lien in favor of said plaintiff for the $500 which Theresa and Dennis Callahan promised to pay to extinguish the debt due from Briscoe Gaines to Susan M. Alexander; or, if not, then that the purchase by said Susan of said lot 5, under the trust deed of Theresa and Dennis Callahan, was an acceptance of the promise of said Theresa and Dennis to pay the debt due her from Briscoe Gaines, and that such acceptance operated to extinguish the mortgage of the plaintiff to Alexander to secure said debt.

The circuit court sustained a demurrer to this petition and final judgment was entered thereon in favor of the defendants.

It is the doctrine of this court that when a mortgage or deed of trust is taken, on the land conveyed, for a part of the unpaid purchase money, the vendor's lien for the remainder of such unpaid purchase money, is thereby waived, unless it is expressly stated in such mortgage or deed of trust, that such lien is not waived. *Emison v. Whit-*

tlesey, 55 Mo. 254. No such statement is alleged to be in the trust deed executed by Theresa and Dennis Callahan, and it is, therefore, unnecessary to further consider the first claim made by the appellant.

As to the second claim set up in the petition, it is only necessary to say that we know of no authority which holds that the simple acceptance by suit or otherwise, by a third person of a promise made to pay a debt due such third person from another, will operate to release such other person from all liability to such third person on account of such debt. To extinguish the obligation of the original debtor, it must appear that the subsequent obligation was accepted in lieu thereof, otherwise the second obligation will be regarded only as collateral and additional to the first.

We are all of opinion that the demurrer to the petition was properly sustained, and the judgment of the circuit court will be affirmed.

THE STATE v. JEFFERSON, *Appellant.*

1. **Practice, Criminal**: DEFENDANT'S TESTIMONY. Testimony given by the defendant in a criminal case in his own behalf, may be used against him on a subsequent trial.
2. **Witness**: COMPETENCY OF CHILD: PRACTICE IN SUPREME COURT. Where a child under the age of ten years is presented as a witness, and the trial judge, upon personal inspection and oral examination, finds as a fact that the child is competent to testify, such finding will not be reviewed by this court, especially in a case where the examination as made is not preserved in the record.
3. **Dying Declarations.** It is well settled that dying declarations are admissible as such only in cases of homicide, where the death of the declarant is the subject of the charge and the circumstances of the death are the subject of the dying declaration.
4. **Instructions.** The fact that instructions asked by defendant and refused in a criminal case, are lost so that they cannot be examined

by this court, is no ground for reversing a judgment of conviction, especially where it appears that sufficient instructions were given by the court.

Appeal from Jackson Criminal Court.—HON. H. P. WHITE, Judge.

AFFIRMED.

R. J. Haire for appellant.

D. H. McIntyre, Attorney General, for the State.

NORTON, J.—The defendant was indicted for murder in the first degree, at the November term, 1881, of the criminal court of Jackson county, for killing one William Mulholland. He was tried at the January term, 1882, of said court, which resulted in his conviction for murder in the second degree, his punishment being assessed at imprisonment in the penitentiary for life. His motion for new trial being overruled he brings the case to this court on appeal, and assigns for error the action of the court in admitting and rejecting evidence and in giving and refusing instructions.

It is argued by defendant's counsel that the court erred in admitting the evidence of defendant's wife, (she being dead,) given before the justice of the peace on the preliminary examination of defendant, and before the court at Independence on a former trial of defendant, inasmuch as it did not satisfactorily appear that she testified willingly. The question thus presented cannot be considered by us, for the reason that it does not appear from the record that the evidence objected to was admitted or received on the trial, but on the contrary, it is stated expressly in the bill of exceptions that her evidence does not constitute any part of the transcript.

It appears from the bill of exceptions that on a former trial of this cause defendant offered himself as a witness

1. PRACTICE, CRIMINAL: defendant's testimony.

and was examined. The evidence given by him on such trial, after being identified by the stenographer who took and transcribed it, was offered by the State on the last trial. This evidence was objected to as being incompetent. The objection was overruled, and we think properly under the decision of this court in the case of the *State v. Eddings*, 71 Mo. 545, where it was distinctly held that such evidence was competent.

2. WITNESS: competency of child: practice in supreme court.

The State offered as a witness Henry Jefferson, a boy under ten years of age. The defendant objected to his introduction on the ground of his age. The statute upon this subject provides that a child under ten years of age, who appears to be incapable of receiving just impressions of the facts respecting which the child is examined or of relating them truly, shall be incompetent to testify as a witness. The record before us discloses the fact that the child was about six years old, and that the trial court, after testing his capacity by a full examination of him, admitted him as a witness. The examination as made is not preserved in the record, it only appearing that upon a full examination he was adjudged to be competent. It has been held by this court in the case of the *State v. Scanlan*, 58 Mo. 204, that when a child under the age of ten years is presented as a witness, and the trial judge, upon personal inspection and oral examination, finds as a fact that the child is competent to testify, that such finding is not subject to review by this court. This was held in a case where the examination made by the judge as to the capacity of the child was fully detailed in the record, and if his finding in such a case is not the subject of review, his finding in cases where the record shows, as in this case, that it was based on a thorough examination which is not detailed nor preserved in the record, most certainly cannot be reviewed, as the presumption will be indulged that his finding was justified by the examination made.

During the progress of the trial defendant offered to

prove by Mrs. Moore the dying declarations of Mrs. Jefferson, the wife of defendant, which evidence the court refused to receive, and this action is complained of as being erroneous. We are of the opinion that the court did not err in this respect. Mr Greenleaf thus states the rule: "It was at one time held by respectable authorities, that the general principle governing dying declarations warranted their admission in all cases civil and criminal, but it is now well settled that they are admissible, as such, only in cases of homicide where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. * * But in thus restricting the evidence of dying declarations to cases of trial for homicide of the declarant, it should be observed that this applies only to declarations offered on the sole ground that they were made *in extremis*." Greenf. Ev., (2 Ed.) § 156; 1 East P. C., 353.

3. DYING DECLARATIONS.

It also appears that certain instructions asked by defendant were refused; these instructions are not incorporated in the bill of exceptions for the reason, as therein stated, that they were lost. This does not constitute a ground for reversal, especially so in a case where it appears, as it does in the case before us, that the instructions which were given by the court fully covered the case as made both by the State and defendant.

4. INSTRUCTIONS.

The court, on behalf of the State, gave instructions for murder in the first and second degree, which it is unnecessary to advert to further than to say that the instructions as to murder in the second degree, of which offense defendant was convicted, were in strict compliance with the rulings of this court in the cases of *State v. Curtis*, 70 Mo. 594; *State v. Harris*, 73 Mo. 287. Nine instructions were given for defendant which put the law of the case to the jury in as favorable a light as possible for him. Upon examination of the whole record, we have discovered noth-

ing which would justify us in interfering with the judgment, and it is hereby affirmed, with the concurrence of all the judges.

HAWKINS v. ROBY, *Appellant.*

Trespass: UNLAWFUL DETAINER: WASTE. The action of trespass does not lie for waste committed upon land by permission of a person actually in possession, though the possession be unlawful. The remedy is an action of unlawful detainer, in which the party lawfully entitled may recover as well the waste and injury committed as the possession.

Appeal from Cass Circuit Court.—Trial before HON. A. COMINGO, sitting as Special Judge.

REVERSED.

James T. Burney for appellant.

The plaintiff in an action for trespass must have had the actual or constructive possession of the premises at the time of the injury complained of. 1 Addison on Torts, (Wood's Ed.) § 442, pp. 446, 447, note 2; Moak's Underhill on Torts, 368, 369, 370; *Gardner v. Heart*, 1 Comst. 528; *Cochran v. Whitesides*, 34 Mo. 417; *Brown v. Carter*, 52 Mo. 46; *More v. Perry*, 61 Mo. 174. A person ousted of possession, even forcibly, must resort to his action for possession and therein claim and recover damages for rents, profits, etc. *Stockwell v. Phelps*, 34 N. Y. 363. One cannot have constructive possession of premises while another actually occupies them adversely to him. *Washburn v. Cutter*, 17 Minn. 361; *Renshaw v. Lloyd*, 50 Mo. 368.

Wooldridge & Daniel for respondent.

Under the circumstances the attornment to L. P. Summers by Honaker, without the consent of his lessor, was void. *Merchants' Bank v. Clavin*, 60 Mo. 559; *McCartney v. Auer*, 50 Mo. 395; *Rutherford v. Ullman*, 42 Mo. 216; R. S. 1879, § 3080. On and after the 1st day of March, 1879, Honaker and Foster were unlawfully in the possession of any portion of said 160 acres, and could hence give no legal authority to defendant to enter and pasture the same. 3 Washburn on Real Prop., (3 Ed.) 117, 118; *Hunt v. Cope*, Cowp. 242; Tyler on Ejectment, (Ed. 1871) 899, 900. Hawkins was in the actual possession on the 1st day of March, 1879, of a part of said 160 acres, and in the constructive possession of the whole sufficiently to recover against the defendant, who admitted he was a trespasser. *Reed v. Price*, 30 Mo. 442; *Renshaw v. Lloyd*, 50 Mo. 368. An eviction cannot be had, nor a constructive possession defeated, by a mere trespasser or illegal ouster. *McFadin v. Rippey*, 8 Mo. 738.

Hough, C. J.—The plaintiff and one Hines rented 160 acres of land in Cass county, from A. J. Summers, for one year, beginning March 1st, 1878, and ending March 1st, 1879. In June, 1878, T. A. Honaker purchased the interest of said Hines under said lease, and under an agreement with said tenants and with the consent of the landlord, one Foster occupied and cultivated the northwest quarter of said tract. During the year 1878, A. J. Summers sold said 160 acres to one Jenkins, and sometime thereafter said Summers, acting as the agent of Jenkins, leased the whole of said tract to the plaintiff for one year, beginning March 1st, 1879, and ending March 1st, 1880. It further appears that in 1877, one L. P. Summers purchased said land at a sale under execution against A. J. Summers, and in December, 1878, he leased said land to Honaker for one

year from March 1st, 1879, and Honaker, with the consent of L. P. Summers, leased to Foster the forty acres cultivated by him under the plaintiff and said Honaker during the previous year. On March 1st, 1879, Honaker and Foster refused to surrender possession of the premises to the plaintiff or to A. J. Summers, and claimed the right to the possession of the entire farm under the lease from L. P. Summers, and had actual possession of the whole, except four or five acres held by the plaintiff. The plaintiff occupied one room in a house on the premises and Honaker another room in the same house. It further appears that in May, 1879, L. P Summers purchased said farm at a sale under a deed of trust executed by A. J. Summers. On the 3rd day of March, 1879, after the expiration of the lease of A. J. Summers to Hawkins and Hines, the defendant Roby, with the permission of Honaker and Foster, herded forty-seven head of cattle on that portion of the farm which was in the actual possession of Honaker and Foster, and said cattle consumed a quantity of stalks standing in the field, and the defendant, though notified by the plaintiff to do so, refused to drive them off. Thereupon the plaintiff instituted the present action before a justice of the peace, and filed the following statement:

A. H. Roby, to C. C. Hawkins, Dr.

To trespass and damage by forty-seven head of cattle from March 10th to March 17th, 1879, belonging to and owned by A. H. Roby, on fields of stalks owned by C. C. Hawkins . . . $18 80

C. C. Hawkins.

At the time this suit was tried, an action of unlawful detainer brought by Jenkins against Honaker and Foster, was pending and undetermined. The plaintiff recovered judgment before the justice and also in the circuit court, and the defendant has appealed.

If L. P. Summers had purchased the farm in question under the trust deed, or at execution sale, after the making of the lease by A. J. Summers to Hawkins and Hines,

and before its expiration, Honaker might lawfully have attorned to L. P. Summers, and have taken a lease from him for the ensuing year; but he could not dispute his landlord's title under the circumstances herein stated, and attorn to L. P. Summers. He should have surrendered possession to A. J. Summers at the expiration of his lease, and, having refused to do so, he was wrongfully in possession and unlawfully holding over. But neither Jenkins nor the plaintiff could maintain a simple action of trespass against any person who might intrude upon the unlawful possession of Honaker and Foster, nor against any person whom they might permit to come upon the premises. *Cochran v. Whitesides*, 34 Mo. 417. Should the action of unlawful detainer against Honaker and Foster be determined against them, judgment can be rendered in that suit for any waste or injury committed by them or with their consent, upon the premises unlawfully detained. R. S., § 2434. The judgment of the circuit court will be reversed. All concur,

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The State *ex rel.* Attorney General v. The Kansas City, St. Joseph & Council Bluffs Railroad Company.

1. **Railroads**: DUTY OF RESPONDENT TO RUN TRAINS TO SAVANNAH. Under the charter of the Missouri Valley Railroad Company and its successor, the Kansas City, St. Joseph & Council Bluffs Railroad Company, and the acts amendatory thereof, the latter company is bound to maintain railroad connection between the cities of St. Joseph and Savannah and to run a train of cars daily between those points; but it is not bound to make Savannah a point on its main track or to run all its trains to the old depot at that place. In maintaining a switch from this depot to the depot on the new line located and established under and by authority of the amendatory act of 1871, and running a train of cars daily over this switch to the old depot, the company sufficiently complies with the law.
2. **Mandamus.** Cases may arise where the applicant for relief has

an undoubted legal right for which mandamus is the proper remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse the relief.

3. ———. The peremptory writ of mandamus must conform strictly to the alternative writ. Overruling *School District No. 1 v. Board of Education of Lamar*, 73 Mo. 627, and *O. V. & S. K. R. R. Co. v. Morgan Co. Ct.*, 53 Mo. 157.

Mandamus.

WRIT DENIED.

David Rea & Son and *Pembroke Mercer* for relator.

B. F. Stringfellow and *Strong & Mosman* for respondent.

HENRY, J.—This is a proceeding by mandamus to compel the respondent to run all its passenger and freight trains, and at least one train of cars daily, back and forth, to its depot in the town of Savannah, and to maintain and keep the depot there, so as to accommodate the passengers and shippers who may desire to ship produce and merchandise or to take passage from said depot. The whole controversy turns upon the construction of several acts of the legislature in relation to this respondent and the railroad company to whose rights it succeeded.

By an act approved March 8th, 1867, the Missouri Valley Railroad Company had authority to locate, construct, use, operate and enjoy a railroad from a point at or near the western terminus of the Pacific Railroad through * * the towns of Weston and St. Joseph * * to the southern line of the state of Iowa, and on and over the roads located by the Atchison and St. Joseph, the Weston and Atchison and the Platte County Railroad Companies, or either of them, with the privilege of changing the line of the Platte County Railroad so as to run from a point in the city of St. Joseph, along the valley of the Missouri

1. RAILROADS: duty of respondent to run trains to Savannah.

river by way of Forest City to the Iowa line * * and of locating, constructing, using, operating and enjoying a branch road from the town of Savannah to the Iowa line, in the direction of Des Moines City. The act also contains the following: "Provided that nothing in this act shall be taken or construed to authorize said company, its successors or assigns, to change the general route, tear up, destroy or render unfit for ordinary railroad purposes that part of their railroad or any portion thereof, which extends from their connection in the city of St. Joseph with the road running south to Weston to their present terminus in the town of Savannah, but said road from St. Joseph to Savannah shall be kept in good running order, and at least one locomotive and train of cars shall be run daily back and forth over the same, accidents excepted, and Sundays at the discretion of the company; and in default thereof, all rights and privileges and franchises granted by this act are to be held as null, void and of no effect." The Missouri Valley Railroad Company took possession of said road and ran and operated the same from St. Joseph to said Savannah depot until the 11th of June, 1870, and during that time constructed, as a part of its road, a road from said depot in a northern direction to the north line of the State of Missouri. In July, 1870, that company consolidated with the St. Joseph & Council Bluffs Railroad Company and formed one company styled the Kansas City, St. Joseph & Council Bluffs Railroad Company. It is not denied that the latter company, the respondent herein, succeeded to the rights and assumed the obligations conferred and imposed by the act of 1867.

By an act of the general assembly approved February 8th, 1871, the respondent was authorized "to change the general route of that part of its railroad which extends from its connection in the city of St. Joseph, with that other part of said road which runs south to Weston, to its present depot in the city of Savannah, so as to lessen the grades of said part of said road, and to cheapen the cost

of operating the same; provided, that said company shall continue to keep and maintain its depot at Savannah at the present site of said Savannah depot." Under and in pursuance of that act the road from St. Joseph to Savannah was torn up, and a road constructed upon another route, which ran a half mile from the town of Savannah and formed part of the main line of respondent's road by connecting with that part of the road running north from Savannah. That portion of the latter road which lay between this connection and the old depot at Savannah has been used as a switch, on which trains of cars approach the old Savannah depot from the north.

Respondent contends that the act of 1871 repealed the proviso contained in the act of 1867. That it repealed so much of the proviso as related to changing the general route of that part of the road and tearing up the track, we entertain no doubt; but it by no means follows that the requirement to run a daily train of cars to the old Savannah depot was repealed. The act of 1871 expressly requires the company to "continue to keep and maintain its depot at Savannah at the present site of said Savannah depot." On any other hypothesis than that of the duty of the company to run a train of cars to that depot, as required by the act of 1867, the requirement to keep and maintain a depot at the site of the one already there is sheer nonsense. We assume that in changing the general route of the road between St. Joseph and Savannah the company has consulted the public interest and selected the best route attainable. Nothing now in the pleadings raises an issue on that point. We are also of the opinion that in merely maintaining a switch from its new depot north of Savannah to the old Savannah depot the company has not violated the letter or spirit of the act which authorized the change of the route of the road between St. Joseph and Savannah, and that, as the law now stands, the respondent is under a legal obligation to keep and maintain a railroad connection between St. Joseph and Savannah, and to run a train of

cars daily between those points, as required by the act of 1867. But this is not all the relator asks. He also asks that the respondent be required to run all its trains to the old depot at Savannah, whether through or local, freight or passenger trains, going north or south, construing the acts in question in effect as requiring the company to make Savannah a point on the main line of its road and to run all its trains to the old depot. We do not think they bear this construction. The inconvenience and danger to the traveling public and shippers of produce and merchandise over the road is a strong argument against it. In the relator's view every train, both passenger and freight, whether it has a passenger or pound of freight for Savannah, would have to be switched off of the main track and run down to the Savannah depot with no practical object in view, and at an unnecessary increase of the danger incident to switching trains, and occasioning delay ruinous to shippers and detrimental to all other interests than those of the town of Savannah, without benefiting the town in any conceivable, substantial manner whatever.

If such were the conceded law, whether a court would by mandamus compel a party to discharge such an obliga-
2. MANDAMUS. tion is by no means clear. "Cases may arise where the applicant for relief has an undoubted legal right for which mandamus is the proper remedy, but where the court may, in the exercise of a wise judicial discretion, still refuse the relief." High on Extraordinary Remedies, § 9.

Holding that relator is entitled to a portion of what he asks for, but not the balance, can we grant the prayer
3. ——. and award a peremptory writ for that to which he is entitled? High, in his work above cited, says: "It is a well settled principle that the peremptory writ must conform strictly to the alternative mandamus, being necessarily limited as to form by the terms of the alternative writ. In other words, the courts are powerless to award the peremptory writ of mandamus in any other

form than that fixed by the alternative writ. It follows, therefore, that if the alternative writ commands the doing of several things, it is incumbent upon the relator, in order to entitle himself to the peremptory writ, to show that he is entitled to the performance of all the things specified, and if he fails in any substantial part in establishing his title to any of the things sought, there can be no peremptory mandamus." § 548; Tapping on Mand., 327; Moses on Mand., 207; *State ex rel. v. The Town of Pacific*, 61 Mo. 158; *State ex rel. v. Holladay*, 65 Mo. 75. In the case of *School District No.* 1 *v. The Board of Education of Lamar*, 73 Mo. 627, the contrary was held. In that case, by an oversight, this court followed the case of the *O. V. & S. K. R. R. Co. v. The County Ct. of Morgan Co.*, 53 Mo. 157, which was in effect overruled by the *State ex rel. v. Trustees of the Town of Pacific*, 61 Mo. 158, followed in the subsequent case of *State ex rel. v. Holladay*, *supra*.

For the foregoing reasons the peremptory writ is refused. All concur.

SKINNER v. SKINNER'S EXECUTORS, *Appellants*.

Duplicate Evidences of Indebtedness, Action on. A man about to marry executed a promissory note in favor of his intended wife, whereby he bound his legal representatives, twelve months after his death, to pay her $4,000. On the same day he executed a deed of trust on real estate to secure the payment of this note, and he and his intended wife executed a marriage contract wherein he stipulated for the payment of said $4,000, and in consideration thereof she agreed to claim no dower or other right in his estate. The marriage took place, and the husband having died the wife presented the note for allowance against his estate. Objection being made to the introduction of the marriage contract at the trial; *Held*, that inasmuch as the note, under the statute, imported a consideration, it was not necessary to introduce the marriage contract by way of showing a consideration for the note, but inasmuch as

the contract and note related to the same transaction, the introduction of the contract could not prejudice the estate. *Held*, also, that although they both represented the same indebtedness, it was not necessary to sue upon both, since satisfaction of either would be a bar to recovery on the other.

Appeal from Montgomery Circuit Court.—Hon. G. Porter, Judge.

Affirmed.

Forrist & Fry for appellants.

Carkener & Rosenberger for respondent.

Ray, J.—This cause originated in the probate court of Montgomery county, where the plaintiff had judgment, from which the defendants appealed to the circuit court of that county, where, on a trial anew, the plaintiff again had judgment, from which the defendants have appealed to this court.

The proceeding in the probate court was to obtain judgment and classification against the estate of Francis Skinner, deceased, of the following claim, in favor of Lucinda Skinner, the respondent, to-wit:

"$4,000. High Hill, Mo., May 6th, 1868.

I promise to pay, twelve months after my death, to Lucinda Peery $4,000, value received, with ten per cent interest from maturity, and I bind hereby my executors, administrators and assigns, to pay said $4,000 after maturity, out of any real and personal property, provided that the said Lucinda Peery is at the day of my death, living with me as my wife.

Francis Skinner."

On the trial, in the circuit court, before the court sitting as a jury, the respondent, to support her claim, offered in evidence the said note with proof of its execution. She next read in evidence a deed of trust on certain real estate

to secure the payment of said note which was executed by the testator on the 6th day of May, 1868, and duly acknowledged and recorded in the proper office. Respondent then called witness Hunt, who testified to the marriage of respondent with the testator, which took place on the 7th day of May, 1868; that she lived with him as his wife from that time till his death in April, 1877, (nursing and taking care of him in his last sickness, etc.,) and that she is the same Lucinda Peery named in the note. It also appeared that the defendants were the executors of last the will and testament of said testator, Francis Skinner, and that twelve months had elapsed since the death of said testator, and prior to the presentation of said note for allowance in the probate court. It further appeared that said respondent, prior to her marriage with said testator, had been married to a man named Peery; that said prior marriage took place in Missouri prior to 1843; that in the year last named, said Peery left the respondent and had never been heard from since by her or her friends, and that she had long considered and believed him to be dead; that no divorce had ever been sought or obtained from said Peery; that said first husband had been absent and unheard from for about twenty-five years prior to the marriage to the testator. The respondent then offered in evidence a marriage contract between the respondent and testator, made and executed on May 6th, 1868, as follows, to-wit:

"This marriage contract made and entered into, this 6th day of May, A. D. 1868, by and between Francis Skinner, of Montgomery county, and State of Missouri, party of the first part, and Lucinda Peery, of Montgomery county, and State of Missouri, party of the second part, witnesseth: That whereas, the party of the first part is seized in fee of certain real estate situated in the State of Missouri, and is the owner of other personal property, and a marriage is hereby intended to be solemnized between the aforesaid parties; therefore it is agreed between the parties that the said party of the second part shall receive

after the death of the party of the first part, should she be the survivor, $4.000 in money, to be paid to the second party as her absolute property, out of the estate of the party of the first part, as speedily and as early after the death of the said first party, as circumstances will admit. It is understood that the above mentioned $4,000 shall be paid prior to any distribution of any of the estate of the party of the first part to his heirs or devisees, and the party of the second part, in consideration of the premises and in consideration of the sum of $1 to her in hand paid by the party of the first part, the receipt of which is hereby acknowledged, does for herself, her heirs and executors and administrators, covenant and agree with the party of the first part, his heirs and administrators and executors, that the above mentioned $4,000 shall be in full satisfaction of her dower in the estate of the party of the first part, whether present or future, and shall bar her from claiming any interest whatever in the personal estate of the first party, whether present or future, as heir, devisee or as his widow, if she should survive after said marriage, unless some part thereof be given her by his last will, or some act done by him subsequent to the execution of these presents. It is also covenanted and agreed that the party of the second part shall not be entitled to receive the above mentioned $4,000 in the event the parties are separated and not living together as man and wife at the time of the death of the party of the first part, and that the estate of said Mrs Peery shall vest in said testator."

Respondent then re-called witness Hunt, who testified that said marriage contract, deed of trust and note were all made and executed on the 6th day of May, 1868; that the marriage took place on the day following; that the note was given for the same $4,000 mentioned in the marriage contract; that the note, deed of trust and marriage contract were all executed at the same time, as one entire transaction. Appellants objected to all this evidence of witness Hunt, but the court overruled their objections and

they excepted. The respondent here rested, and the defendants offered a demurrer to the evidence, which the court overruled.

The defendants, on their part, then offered to read in evidence the last will and testament of said Francis Skinner, to which plaintiff objected, and the court sustained said objection, to which action of the court the defendants excepted. The defendants then stated and read out of said will the following clause or item: "2nd, It is my will and desire, that my executors hereinafter named, pay to my wife, Lucinda Skinner, the sum of $4,000, which she is to have out of my estate according to our marriage contract, executed before our marriage, and which, by the terms of said contract, is to stand in lieu of and in full satisfaction of her dower or right of dower in my estate, real or personal, and in lieu of any interest or claim in and to my estate." And further, that nowhere else, or in any other manner, is respondent named in said will. But the court sustained said objection and excluded said proffered evidence, to which action of the court appellants at the time excepted.

This, in substance, was all the evidence in the cause The court thereupon gave the following declaration of law for the plaintiff, over the objection of the defendants, to-wit: "If the court, sitting as a jury, find from the evidence that Francis Skinner, defendant's testator, executed the instrument sued on; that the same was executed for a valuable consideration; that the plaintiff is the Lucinda Peery therein mentioned; that, after the date of said obligation she intermarried with said Francis Skinner, and that she continued to live with him until his death, and that one year has elapsed since his death, then said plaintiff is entitled to recover, and the verdict must be for plaintiff, for the amount of said obligation, to-wit: $4,000, with interest at ten per cent from twelve months after the date of the death of said Skinner."

The following declarations were also given at the request of the defendant, to-wit:

2. That unless the court, sitting as a jury, shall believe from the evidence in the case that plaintiff was lawfully married to said Francis Skinner and lived with him as his wife at the time of his death, then the verdict must be for the defendants.

3. That if the court, sitting as a jury, shall believe from the evidence in the case that the plaintiff, at the time of her alleged marriage to said Francis Skinner, had a husband living, then the verdict must be for the defendants.

4. That if the court, sitting as a jury, shall believe from the evidence in the cause that plaintiff, before her alleged marriage to said Skinner, was legally married to one Peery and from whom she had not been divorced, and said Peery was alive at the date of the alleged marriage to said Skinner, the verdict must be for the defendants, unless the court so sitting shall further believe from the evidence in the case that said Peery had been absent from plaintiff after her said marriage and in parts unknown to her for the full time of seven years continuously, before her alleged marriage with the said Skinner.

6. If the court, sitting as a jury, shall believe from the evidence in the cause that said plaintiff and said Francis Skinner made and executed the marriage contract offered in evidence; that afterward, in pursuance thereof, said parties thereto were married; that said Francis Skinner has departed this life, and that at his death said plaintiff lived with said Francis Skinner as his wife, then and in such case said contract would create a complete and valid claim against said Francis Skinner and his estate for the sum of $4,000 named therein, and to be paid as in said contract provided.

Certain other declarations were asked and refused for defendants, which will be noticed hereafter. Under the declarations so given, and the evidence in the cause, the

court found for the plaintiff, and gave judgment of allowance and classification accordingly, from which the defendants, after an unsuccessful motion for a new trial, in due time and manner, appealed to this court.

Upon inspection of this record, we are satisfied that the merits of this controversy were fairly submitted to the court, upon the evidence and declarations of law above set out, and the court having found the issues for the plaintiff, the judgment must be affirmed. We will, however, proceed to examine and consider the grounds of error alleged by the appellants, in their brief and argument herein.

It is insisted, for the appellants, that the claim and demand in the probate court was the note alone; that the appeal brought that cause of action alone into the circuit court for a hearing *de novo*, and that the circuit court had no jurisdiction to hear and determine any other claim or demand; that the marriage contract read in evidence on the trial in the circuit court, was a new and independent claim and demand—a distinct cause of action—against the estate of said testator, other and different from that heard and tried below, and that the circuit court thereby committed error in permitting the same to be read in evidence on the trial upon said appeal. It is also insisted that the note, deed of trust and marriage contract (being all for the same $4,000 and made at the same time) constituted but one transaction and one debt; that they must be sued upon as a unit, and cannot be separated and divided, and the note alone sued upon, proved up and allowed, in the probate court; that the marriage contract alone furnished the consideration and created the liability, and that the note in question is without consideration, void and constitutes no cause of action, and that it was, therefore, error to overrule appellants' demurrer to plaintiff's evidence. The declarations of law asked and refused for appellants, were intended to announce and enforce these views, and will be noticed hereafter.

It may be conceded that the jurisdiction of the circuit court was appellate only, and that the only cause it could hear and determine was the one commenced and tried in the probate court, and that the note in question alone was that cause of action. But it does not follow that in admitting the marriage contract in evidence, the court thereby heard or determined a cause of action, other and different from that commenced and tried in the probate court. The only cause of action heard and tried in the circuit court, as we understand it, was that made by the note presented for allowance in the probate court. The marriage contract, it may be, and from the view we have taken of the case, was altogether unnecessary, as an instrument of evidence, to show that the note in question was based upon a valid and sufficient consideration, since, under our statute, the note itself imported a consideration, and was due and payable as therein specified. Rev. St. 1879, § 663. While, therefore, the marriage contract may not be and was not necessary as evidence of a consideration, its introduction as such could not in any way prejudice the rights or interests of defendants. It may also be that the note, deed of trust and marriage contract, all represent the same $4,000, and in a certain sense, may be treated as one entire transaction; yet in contemplation of law, they are but different declarations in writing of the one debt for $4,000, and not different debts for that amount. As such their introduction as evidence did not change or alter the cause of action then on trial, from what it was when tried and determined in the probate court. The note itself was still the only cause of action tried and determined in the circuit court on the appeal, and under the statute it imported a consideration, and did not need the aid of the other evidences of the same claim and debt, and their introduction as such could not have prejudiced the appellants in any way. This objection, therefore, is not well taken.

This view of the case, we think, also furnishes a complete answer to the other objections of the appellants.

Concede that these several papers, the note, deed of trust and marriage contract, all represent but one and the same debt; it does not follow that when legal proceedings become necessary to enforce its collection, they are so far a unit as to require their joint force and presence to constitute a cause of action. It may be, and doubtless is true, that a recovery and satisfaction of this one debt, upon any one of the several evidences thereof, would constitute a complete bar to a subsequent recovery upon any other one of said declarations of said indebtedness. It may also be that the marriage contemplated in said agreement, with its conditions, stipulations and incidents therein specified, was the common consideration of all these papers, yet it does not follow that that fact takes from the note its quality of importing a consideration, as provided by statute, or renders their presence necessary to a recovery, or makes their introduction as evidence work a change in the cause of action then on trial. There is, therefore, we think, nothing in these objections or in the declarations of law asked but refused, and, as all other questions in the cause touching the validity of the marriage, the identity of the claimant, the death of her former husband, and the performance of the conditions and stipulations contemplated and provided for in the marriage transaction, were properly submitted, under correct declarations of law applicable to the facts in evidence, we see no reason to disturb the finding and judgment of the circuit court.

The exclusion of the will of the testator, as well as the item or claim thereof offered in evidence by the appellants, could not possibly prejudice the appellants, since it only affirmed the marriage transaction, the note included, and at most was only a further and additional evidence of the same one indebtedness represented by the note sued on and allowed.

The authorities cited by appellants, properly considered, are not in conflict with the views herein expressed,

when applied to the facts of this case. For these reasons the judgment of the circuit court is affirmed. All the judges concur.

THE STATE v. HAMMOND, *Plaintiff in Error.*

1. **Rape**: INDICTMENT FOR. An indictment for rape need not contain an express averment that the party injured is a woman. The sex may be otherwise indicated, as by the use of the pronoun "her," and this though the christian name may be one ordinarily given to males, as *Francis* for *Frances*.
2. ———. Subsequent assent of the woman, as by asking compensation, will not purge the guilt of rape.
3. ———: EVIDENCE. On a trial for rape the court refused to permit a witness who was present when the alleged offense was committed, to testify whether the woman objected or not. *Held*, error.
4. **Practice**: EVIDENCE. The trial court refused to permit a witness to say whether he had made a certain statement at the preliminary examination differing from one just made by him at the trial. *Held*, error.
5. **Proving Testimony of Deceased Witness.** The court permitted witnesses to state the substance of the testimony of the prosecutrix given at the preliminary examination, she having since died. *Held*, no error.

Error to Dunklin Circuit Court.—Trial before C. L. KEATON, ESQ., Sitting as Special Judge.

REVERSED.

S. M. Chapman for plaintiff in error.

D. H. McIntyre, Attorney General, for the State.

I.

SHERWOOD, J.—The defendant was tried and convicted on a charge of rape, the indictment charging that the offense was committed on the person of *Francis* Sorrels.

It is insisted that the indictment is faulty on this ground and also on the further ground that it contains no allegation that the person on whom the alleged crime was committed was a woman.

Regarding the latter point, it need not be averred that the party injured is a woman. *State v. Warner*, 74 Mo. 83. The use of the relative pronoun "her," and the use of the words "against her will," sufficiently indicate the sex of the injured party.

And as to the name "Francis" being the name of a man, our statute cures any variance between the charge in the indictment and the evidence offered in its support; unless the trial court "shall find that such variance is material to the merits of the case, and prejudicial to the defense of the defendant." *State v. Wammack*, 70 Mo. 410. Here the evidence abundantly shows that Francis Sorrels was a woman, and by that name was usually called, instead of the more proper appellation of *Frances*. There is nothing in the point.

II.

We have read the evidence, and it must be confessed that it seems difficult to see how the jury could have found the defendant guilty, if careful consideration was given to all the evidence in the cause. But after such consideration on our part, we are not prepared to affirm that there was absolutely no evidence warranting a conviction. If it be true, as stated by one witness for the State, who was present at the preliminary examination, that the defendant had offered Francis Sorrels a dollar and she had refused it, but that when she found that the defendant was determined to gratify his passion, she then asked him for the dollar, it is quite certain that there was no rape committed.

And if it be true, as stated by another witness, that she asked defendant for the dollar, after the alleged injury was done her, it would be extremely improbable that such a crime had occurred. Subsequent assent, however, would

not avoid the consequences of the crime, nor purge the defendant's guilt. But the testimony of the son of the woman, Charles Warner, did not reveal those features so damaging to the prosecution, in reference to a consideration being asked for by the injured party. True, he says he heard "something said about a dollar," but he did not remember what it was. It may be that the jury regarded his testimony sufficient to outweigh the testimony of the other witnesses; and this it was their province to do. *State v. Warner, supra; State v. Musick*, 71 Mo. 401.

III.

Error was committed by the court in refusing to permit Huland, who was present on the occasion in question, to state whether she made any objection to defendant's having intercourse with her. This question was clearly competent.

IV.

Error was also committed by the court in refusing to permit Charles Warner to state whether he had made a certain statement at the preliminary examination, differing from that made by him at the trial when testifying as a witness.

V.

There was no error in permitting the witnesses to state the substance of the testimony given by Francis Sorrels at the preliminary examination, she having since died. *State v. Able*, 65 Mo. 357.

For the errors mentioned, judgment reversed and cause remanded. All concur.

Ex Parte Gray.

Writ of Error Coram Vobis: IMPRISONMENT OF PERSON UNDER EIGHTEEN IN PENITENTIARY. It is well settled that for an error in fact in the proceedings of a court of record, a writ of error *coram vobis* will lie to revoke the judgment, whether it be a court of civil or criminal jurisdiction. Thus, where a person under the age of eighteen years is sentenced to the penitentiary, the court may at at any time, upon being advised of the fact, revoke the sentence and commit the prisoner to jail. The usual way of bringing such matters before the court, according to the practice in this State, is by motion supported by affidavit or evidence.

Habeas Corpus.

WRIT GRANTED.

J. P. McCaminon, *W. D. Hubbard* and *Edwards & Davison* for petitioner.

D. H. McIntyre, Attorney General, for the Warden.

The order of the 18th of December setting aside the judgment regularly made on the 22nd of September previous, at another and different term, was void and of no effect after the term had elapsed at which final judgment was taken; the court possessed no further control or jurisdiction over the case; and the entire proceeding at the November term was *coram non judice*. *Danforth v. Lowe*, 53 Mo. 217. There is no error patent of record, and if there be any irregularity, of which there is no pretense, it could not be shown by matters *de hors* the record. *Phillips v. Evans*, 64 Mo. 17; *Ex parte Kaufman*, 73 Mo. 588. The court had unquestionably lost jurisdiction over the person of the prisoner, which by the statute had been transferred to the custody of the warden, and there is no method known to the law by which any process, order or authority of that court could bring the person under the jurisdiction of the court at the time when it is pretended that the judgment

of the court was set aside. Neither had the court any jurisdiction of the subject matter.

NORTON, J.:—This is a proceeding by *habeas corpus*, the purpose of which is to procure the release of petitioner from his present imprisonment in the penitentiary. It appears from the petition and return to the writ that petitioner, on the 22d of September, 1882, at a special term of the Greene county circuit court, pleaded guilty to an indictment charging him with the crime of grand larceny, and was thereupon sentenced to imprisonment in the penitentiary for four years, and that he is now in the State's prison under such sentence. It further appears that at the November term, 1882, of said circuit court, petitioner filed his motion to set aside the said judgment sentencing him to imprisonment in the penitentiary, for the reason alleged therein that at the time of said sentence he was under the age of eighteen years. On the hearing of said motion it was made to appear by evidence satisfactory to the court, that the fact alleged therein was true, and thereupon the court set aside and revoked the sentence of September 22nd, 1882, in order that defendant might be sentenced to imprisonment in the county jail as prescribed by section 1666, Revised Statutes, which is as follows: "Whenever any person shall be convicted of a felony committed while under eighteen years of age, he shall be sentenced to imprisonment in the county jail not exceeding one year, instead of imprisonment in the penitentiary as provided by the preceding provisions of this law."

The only question presented by the above state of facts is, did the circuit court have jurisdiction to make the order at its November term, 1882, revoking the judgment entered the 22nd of September, 1882, sentencing petitioner to the penitentiary, in order that he might be sentenced as required by said section 1666? This question is settled by the case of *Ex parte Toney*, 11 Mo. 661, where it was held that: "It is settled that for an error in fact in the pro-

ceedings of a court of record, a writ of error *coram vobis* will lie to revoke the judgment, whether it be a court of civil or criminal jurisdiction. If a judgment is rendered against an infant who appears by attorney, this is an error of fact for which a writ of error *coram vobis* will lie, and so it is conceived of a judgment sentencing an infant under sixteen years of age to imprisonment in the penitentiary, as our statute does not permit such punishment to be inflicted upon him." The usual way of bringing such matters before the court, according to the practice in this State, is by motion supported by affidavits or evidence. *Powell v. Gott*, 13 Mo. 458; *Latshaw v. McNees*, 50 Mo. 381; *Craig v. Smith*, 65 Mo. 536; *Stacker v. Cooper Co. Ct.*, 25 Mo. 401; Green & Meyers Mo. Prac., 433.

We are of the opinion that the circuit court had the right to make the order in question, and that it entitled petitioner to be discharged or released from his imprisonment in the penitentiary, and under sections 1996 and 2668, Revised Statutes, the prisoner is hereby sentenced to imprisonment in the county jail of Geene county for the period of nine months, and the warden of the penitentiary who now has petitioner in custody, will deliver him to the marshal of this court to be by him confined in the jail of said county for the said term of nine months. In the judgment all concur.

HASENRITTER v. HASENRITTER, *Executor, Appellant.*

1. **Administration**: WIDOW'S ALLOWANCE: WILL. The husband has no power by will to dispose of the articles which by section 33, page 88, Wagner's Statutes, are allowed to the widow as her absolute property.

2. ——: ——: ——. A provision in the will of the husband in favor of the wife, will never be construed by implication to be in

lieu of dower or any other interest in his estate given by law: the design to substitute one for the other must be unequivocally expressed.

Appeal from Gasconade Circuit Court.—Hon. A. J. Seay, Judge.

Affirmed.

This is a proceeding instituted in the probate court of Gasconade county by Fredericka Hasenritter, widow of Chas. W. Hasenritter, by motion, against R. H. Hasenritter, executor of the last will of Chas. W., to require him to pay her the sum of $400 in lieu of her dower in his personal estate, and a compensation in lieu of one year's provisions. The executor defended on the ground that the deceased had in his last will made other provision for her, and she had accepted the provision so made. At the trial it appeared that in 1871 deceased insured his life for $1,000 in the Odd Fellows' Insurance Association for the benefit of his wife; that his wife then living was Bertha A. Hasenritter; that said Bertha subsequently died, and deceased then married the said Fredericka; that deceased had children of the first marriage, but none of the second. It also appeared that deceased left a will, the provisions of which were as follows: 1. A direction for the payment of his debts. 2. "The insurance on my life in the Odd Fellows' Insurance Association, payable to my wife, Fredericka, I will and bequeath to her, free from all debts, and my said wife is to have her dower in all real property according to law." 3. "The balance of my estate, of whatever kind, real or personal," the testator directed to be divided among his children. It also appeared that the widow had received the $1,000 from the insurance association. The probate court ordered the executor to pay the widow the sums found to be due her, and the circuit court affirmed the judgment.

Smith & Krauthoff and *L. Hoffman* for appellant.

That the testator designed the $1,000 to be all of his widow's interest in his estate, is made clear by the language immediately following the bequest; "The balance of my estate, of whatever kind, real or personal, I wish to have divided," etc., among his children. It is clear that he intended to give all the balance of his estate, of whatever kind, to his children. This balance included the widow's dower interest in his personalty. Having already given her a large portion of his personal estate, it cannot, consistently with the terms of the will, be held that he had any idea of giving her any further interest in or portion of it. If possible, this intention is still more apparent from the fact that he expressly devises to his widow her dower in his real estate. The rule of construction in such cases is, that where there are more than one thing belonging to the same class, the expression of one or more of them is the exclusion of all not expressed. 2 Pars. Cont., 515. Hence, the positive devise of her dower interest in his real estate must be construed as a negativing of a similar interest in his personalty.

Rudolph Hirzel for respondent.

SHERWOOD, J.—In *Hastings v. Myers*, 21 Mo. 519, it was held that the right of a widow to $200 worth of personal property was absolute, did not depend upon her election, and vested immediately upon the death of her husband. This ruling was based upon what is now sections 35, 36 and 37, page 88, Wagner's Statutes, and it was followed in *Cummings v. Cummings*, 51 Mo. 261. The present application is based not only on the section referred to, but upon section 33 of the same article, which declares that "in addition to dower, the widow shall be allowed to keep, as her absolute property, a family bible, * * all grain, meat, vegetables, groceries and other provisions on

hand * * not to exceed the value of $500." And section 34 next thereafter, provides that if such grain, meat or other provisions shall not be on hand at the time of making the inventory, the court shall make a reasonable appropriation out of the assets of the estate to supply such deficiency. It seems quite clear that a construction equally favorable to the widow should be given section 33. And this is especially true, as that section declares in express terms that the property therein mentioned shall be the absolute property of the widow, *i. e.*, requiring no election on her part, in order to secure it. This being true, it must needs follow that the property or the proceeds thereof, claimed in the present application, were not subject to be disposed of by the will of the applicant's deceased husband.

In *Bryant v. McCune*, 49 Mo. 546, where the testator bequeathed to his wife a large amount of both real and personal property to hold during her life, and she having died a contest arose as to who was entitled to the property embraced in section 33, *supra*, it was said: "The argument then, that the property was disposed of by the general language of the will, and that she took only a life estate in it under the will, has no foundation in fact. It is urged that the testator must have intended that his wife should receive and hold what was given her by the will in lieu of dower and in lieu of her statutory right to the property in dispute. But there is no indication in the will that the wife was expected to surrender anything, and in the language of Gardner, J., in *Sheldon v. Bliss*, 8 N. Y. 31: "It is an established principle that a provision in the will of the husband in favor of the wife will never be construed by implication to be in lieu of dower, or any other interest in his estate given by law; the design to substitute one for the other must be unequivocally expressed." There are no such unequivocal expressions in the will of the testator in the case at bar. We might presume, we might surmise, that the testator intended in his will to dis-

pose of his property in the manner defendant asserts, but this is no case for surmises or presumption. The cases cited are consequently decisive of this one, and, therefore, judgment affirmed. All concur.

McCord's Administrator v. McCord *et al.*, *Appellants.*

1. **Donatio Causa Mortis.** To support a *donatio causa mortis* there must be a delivery of the subject by the donor as a gift, and the delivery must be such as, in case of a gift *inter vivos*, would invest the donee with the title.

2. ——: CASE ADJUDGED. Where a father in his last illness placed a package of money in the possession of his son to take care of, and some days afterward directed the son, in case he should not get well, to take the money and, after paying funeral expenses, etc., to divide the remainder equally between himself and certain of his brothers and sisters; *Held*, that the only delivery ever made by the father being by way of bailment and not in execution or contemplation of a gift, there was no *donatio causa mortis*.

   The father at the same time gave instructions as to the settlement of his landed estate in which he directed a portion of the money to be used. He also made provision for payment of debts. *Held*, that these dispositions were void under the statute of wills; and as they and the gift of the money constituted but one transaction, the latter was for this reason also void.

3. **Practice**: JUDGMENT. In finally disposing of a case the court should render judgment either for or against every party to the record.

Appeal from Johnson Circuit Court.—HON. NOAH M. GIVAN, Judge.

REVERSED.

Alex. Graves and *A. F. Alexander* for appellants.

When any person in last sickness with a view to death, delivers any personal property to another, who accepts the same, with instructions that at or after his death it shall

be delivered to a third person, or be divided between third persons, in a specific proportion, it is a good gift *mortis causa;* and if the donor dies of that sickness without having revoked the gift, the donee is a trustee of the property for the uses indicated by the donor. *Clough v. Clough*, 117 Mass. 83, 85; *Pierce v. Boston B'k*, 129 Mass. 425; *s. c.*, 37 Am. Rep. 371; *Sheedy v. Roach*, 124 Mass. 472; *s. c.*, 26 Am. Rep. 680; *Ellis v. Secor*, 31 Mich. 185; *s. c.*, 18 Am. Rep. 178; *Turner v. Estabrook*, 129 Mass. 425; *Hill v. Stevenson*, 63 Me. 364; *s. c.*, 18 Am. Rep. 231; *Davis v. Ney*, 125 Mass. 590; *s. c.*, 28 Am. Rep. 272; *Grymes v. Hone*, 49 N. Y. 17; *Sessions v. Mosely*, 4 Cush. 87; *Coutant v. Schuyler*, 1 Paige 316; *Trorlicht v. Weizenecker*, 1 Mo. App. 482; *Caldwell v. Renfrew*, 33 Vt. 213; *Carradine v. Carradine*, 58 Miss. 286; *s. c.*, 38 Am. Rep. 324. No particular ceremony or technical words are necessary to express the intention of the donor with regard to the property; but it is only necessary that such an intention was expressed or clearly indicated, and that the amount each beneficiary is to have may be ascertained; and if such an intention was indicated, it is the duty of the courts to carry out that intention. *Clough v. Clough*, 117 Mass. 83, 85; *Sheedy v. Roach*, 124 Mass. 472; *s. c.*, 26 Am. Rep. 680; *Ellis v. Secor*, 31 Mich. 185; *s. c.*, 18 Am. Rep. 178; *Dresser v. Dresser*, 46 Me. 48; 2 Story Eq. (12 Ed.) 607 a. If the donee be in the possession of the property at the time the intentions of the donor are expressed to him, it is a sufficient delivery to him, and the law requires no new delivery. *Hunt v. Hunt*, 119 Mass. 474, 476; *Champney v. Blanchard*, 39 N. Y. 111; *Wing v. Merchant*, 57 Me. 383; *Stevens v. Stevens*, 2 Hun 470. If the property be in the hands of any bailee of the donor who is notified of the donation at the time it is made, this constitutes a sufficient delivery to the donee. 3 Redfield on Wills, (3 Ed.) 329, note 28; *Waring v. Edmonds*, 11 Md. 424; *How v. Taylor*, 52 Mo. 592. The validity of the gift is not affected by the fact that it constitutes the greater part, or even the whole, of the personal estate of the de-

cedent, nor by the fact that at the same time the decedent gives instructions for the conveyance of real estate for other purposes; *Meach v. Meach*, 24 Vt. 591; 3 Redfield on Wills (3 Ed.) marg. p. 344, § 15; marg. p. 339, § 11; *Ellis v. Secor*, 31 Mich. 185; *Cooper v. Burr*, 45 Barb. 9; nor by the instructions of the decedent to pay a certain sum of the money to defray the expenses of his funeral. *Hills v. Hills*, 8 M. & W. 400; 1 Williams on Exrs., (4 Ed.) 652. *Walter v. Ford*, 74 Mo. 197, cannot be construed to mean that the delivery, to sustain a gift *causa mortis*, must be the same as required in gifts *inter vivos*. Because that case is based on the doctrine laid down by Story; and he says on this point: "The doctrine no longer prevails that where a delivery will not execute a complete gift *inter vivos*, it cannot create a *donatio mortis causa*." 1 Story Eq. Jur., (12 Ed.) p. 591, § 607 c; also note 3.

John F. Philips for respondent.

An indispensable requisite of every gift is a delivery of the subject matter by the donor to the donee. This delivery must be made at the time of the gift. Delivery takes the place of nuncupation. *French v. Raymond*, 39 Vt. 623; *Cutting v. Gilman*, 41 N. H. 147, 151, 152, 153; *Egerton v. Egerton*, 17 N. J. Eq. 421; *Clough v. Clough*, 117 Mass. 84; *Powell v. Hillicar*, 26 Beav. 261; *Bunn v. Markham*, 7 Taunt. 224 (2 E. C. L. 81). There can be no pretense in this case that on Saturday, the day and time of the alleged gift, there was any delivery, any tradition of this property. The money then was down-stairs between the beds and in the possession of Mrs. McCord, and there it remained until after the alleged donor's death.

Appellant invokes the maxim: *Lex non cogit ad vana seu inutilia;* and claims that the money was already in Charles' possession at the time of the gift, and, therefore, no tradition was necessary. Even had the money been within his reach at the time of the gift, well considered

authorities say that is not sufficient. *Cutting v. Gilman*, 41 N. H. 152; *McGrath v. Reynolds*, 116 Mass. 569; *Duncan v. Duncan*, 5 Littel (Ky.) 12; *Delmotte v. Taylor*, 1 Redf. (N. Y.) 417; *French v. Raymond*, 39 Vt. 623; *Shower v. Pilch*, 4 Exch. 478; *Walsh v. Studdart*, 4 Dru. &. War. 159. The authorities holding or intimating to the contrary lose sight of the principle that delivery takes the place of nuncupation, and is the evidence of the consummation of the gift. *Miller v. Jeffries*, 4 Gratt (Va.) 480. Charles McCord, however, did not have possession of the money at the time of the gift, in fact or law. On the Tuesday before, when the money was handed him by the intestate to take care of for him. Charles handed it at the time to his wife to take care of. This was done in the presence of the intestate He saw it and acquiesced in her custodianship, and thereby consented to her being and acting as the depository for him. She thereby became his agent, and not that of her husband. Charles never re-acquired possession of the property during his father's lifetime; nor does the evidence show that he even knew where it was kept. After the owner's death Mrs. McCord got it and handed it to Charles. Her possession was not sufficient to dispense with a redelivery to Charles. *Case v. Dennison*, 9 R. I. 88; *s. c.*, 11 Am. Rep. 222.

The transaction was an attempt to make a parol testamentary disposition of the whole estate, personal and real, of the intestate. As such it cannot be sustained as a gift *causa mortis*. *Headley v. Kirby*, 18 Pa. St. 326; R. S., §§ 3984, 3986, 3987; *French v. Raymond*, 39 Vt. 625; *Haydock v. Haydock*, 34 N. J. Eq. 570; *s. c.*, 38 Am. Rep. 385; *s. c.*, 13 Reporter 434; *Harris v. Clark*, 3 Comst. 121.

The alleged gift must fail because it was not a gift in *praesenti*. There must be a gift and delivery of the property to take effect immediately, subject to be recalled or defeated at donor's recovery. *Hassell v. Basket*, (U. S. C. C. Indiana,) 7 Cent. L. J. 308. The property must pass at the time, and not be intended to pass at the giver's

death. *Gass v. Simpson*, 4 Cold. (Tenn.) 293; *Dole v. Lincoln*, 31 Me. 422, 428; *Chevallier v. Wilson*, 1 Tex. 171; *Zimmerman v. Streeper*, 75 Pa. St. 147; *Shower v. Pilch*, 4 Exch. 478.

Wallace & Chiles also for respondent.

There was no such delivery as the law requires to constitute a gift *mortis causa*. 1 Williams on Executors, (3 Am. Ed.) s. p. 650, 655, and note J; *Winchell v. Mitchell*, 1 Murphy 127. Mere delivery to an agent, in the character of agent for the giver, is not sufficient to constitute a gift *mortis causa*. *Chevallier v. Wilson*, 1 Tex. 161; 3 Redfield on Wills, 330, 331; 2 Gill & John., 215, 217; *Duncan v. Duncan*, 5 Litt. 12; *Cutting v. Gilman*, 41 N. H. 147; *Hassell v. Basket*, 7 Cent. L. J. 308. Both possession and title must pass to the donee to constitute a gift. This applies as well to gifts *causa mortis* as to gifts *inter vivos*. The title must pass *inter vivos*, or it never can pass, but will go to the donor's legal representative. *Gass v. Simpson*, 4 Cold. 293; *Dole v. Lincoln*, 31 Me. 422, 428; *Zimmerman v. Streeper*, 75 Pa. St. 147; *Shower v. Pilch*, 4 Exch. 478; *Huntington v. Gilmore*, 14 Barb. 243, 248; *Spencer v. Vance*, 57 Mo. 429; *Case v. Dennison*, 9 R. I. 90; *Delmotte v. Taylor*, (1 Redf.) 5 N. Y. 417; *Farquharson v. Cave*, 2 Collier's Ch. 366.

The conversation on Saturday was not only a gift of money, but a provision by parol for buying land, conveying away land, putting into possession of land, paying his funeral expenses and partition of money. Manifestly, this whole provision was testamentary in its character, and that part in reference to buying the interest of Mrs. Kirtley in land, and that part directing the making of a deed to Lucy Ann (Broddus) for the farm in Jackson county, could not be enforced, and have no binding validity. But the whole arrangement must be sustained and enforced, or all fall together. It cannot be supposed that the intestate intended part of the arrangement to be carried out, while the bal-

ance failed. But one part was as valid as the other, and the whole was a nullity. *McGrath v. Reynolds*, 116 Mass. 566, 569. But the very language used by the intestate shows that there was no authority in Charles to take possession of the money in the lifetime of Wm. D. McCord, for he said "that in case he should not get well, to take the money," etc. So there could not, under this authority, be any delivery in the lifetime of the deceased, in order to constitute a gift *mortis causa*. *Kenney v. Pub. Admr.*, 2 Bradf. (N. Y.) 319; 1 Story Eq. Jur., §§ 606, 606 a; 2 Kent Com., 445.

There is no pretense of a separate delivery to Charles W. McCord of the $1,400 claimed by him, but only a delivery of $7,700, out of which he was to distribute to himself $1,400; and that delivery was to him, as agent of the alleged donor, Wm. D. McCord. So the subject of the alleged gift to him—$1,400—was not delivered to him. For if there was no valid delivery of the whole sum of $7,600, as gifts *mortis causa*, it will be hardly claimed that a part of such sum, $1,400, was delivered as a gift, *mortis causa*, to Charles, himself.

HENRY, J.—This is a suit by plaintiff, originally against Charles McCord, to recover the sum of $8,000, which, it is alleged, was the property of plaintiff's intestate, and was wrongfully taken possession of by Charles McCord, and converted to his own use. After the death of the intestate, the money was equally divided by Charles McCord between himself and his co-defendants, who, on their motion, over plaintiff's objection, were made parties defendant to the suit. Charles McCord answers, in substance, that the intestate, his father, who was aged and infirm, and in daily apprehension of death, in his last illness delivered to defendant the sum of $1,400, to keep as his own, in case of the donor's death, and the same amount for each of his children, Benjamin, Martha, Sarah and Mary, to be delivered to them respectively, in the event of his death,

and that after his father's death, he made the distribution as directed. The answer of his co-defendants was substantially the same, and the replication was a general denial. The trial of the cause resulted in a judgment for plaintiff against Charles McCord, from which defendants have appealed.

It seems that there was no judgment for or against Charles McCord's co-defendants, and all that appears is, that the court found that they were not necessary parties.

The only one of the numerous questions raised on the trial and argued in the briefs of counsel, which we deem it necessary to pass upon, is whether the intestate made a gift of the money in controversy to defendant, as alleged in the answer; in other words, whether there was a *donatio causa mortis.*

The defendant Charles McCord testified as follows: I was at home; pa died Tuesday morning; he had been at my house two or three months; he had $7,700 at my house; I saw the $7,700 when he gave it to me on Monday about a week before he died; he handed the package of money to me and told me to take care of it for him; he took it from under the head of his bed; it was wrapped in brown paper and securely tied; my wife was in the room at the time, and I just gave it to her and told her to put it away; I gave it to my wife to take care of; I think it was on Saturday before his death, I had gone to the timber, and I sent for a doctor to see him; the doctor came while I was away; doctor was going away when I returned; he told me that he could not do anything for him; I went up to the room; no one was present; I spoke to him and asked him how he felt about dying; he told me that he would rather live, but that he was ready, that his business was all arranged with the exception of the money; I called my wife into the room. He said that in case he should not get well to take the money, and, after paying the funeral expenses, which he did not want to cost less than $100, then to pay to mother the $600 for her lifetime interest in

the Kirtley farm, and put Mrs. Kirtley in possession of her farm, then to divide the balance equally between the five —Martha, Mary and Sarah, Frank and myself. He then said to join in and make Lucy Ann a deed to her farm in Jackson county. I believe I asked him then what he wished me to do with the fifty-five acre tract, the little farm in Jackson county. He said to sell it and pay expenses or debts or something; he was aware of the fact that he would not get well; he died on Tuesday next at eleven o'clock a. m.; he did not get out of bed again except to the chamber. I carried the instructions out. On the day of the funeral I told Robinson, at Lexington, that I wanted to see them before they left town; in the meantime brother had left town, also Mrs. Kirtley; I told Robinson and wife and Hill and wife what pa's instructions were, and when it was convenient I would meet them at Robinson's or Kirtley's and distribute the money; that I had the money at home; a week or ten days after this I sent a note to Frank to meet me at Robinson's; I met them, except Frank, at Robinson's and delivered the money and took their receipts; I gave them $1,400 each. I paid mother the $600. I paid his funeral expenses.

The testimony of Mrs. Frances McCord, wife of Charles McCord, was in substance the same as that of her husband. The court admitted this testimony, but afterward declared, that Charles McCord and wife were not competent witnesses and excluded it.

If what was testified to by McCord and wife, who were the only witnesses to prove the gift, does not establish a *donatio causa mortis*, then even if the court erred in rejecting their testimony, the judgment should be affirmed, because it is not claimed that there was a gift *inter vivos*, and no title, except by gift, is asserted. The distinctions on the subject of gifts of this character, are finely drawn, and a conflict is frequently declared between the authorities when it is more apparent than real. To constitute such a gift, it must be made in

1. DONATIO CAUSA MORTIS.

the last illness of the donor, or in contemplation and expectation of death. There must be a delivery of the subject by the donor, and it is "defeasible by reclamation, the contingency of survivorship, or deliverance from peril." 2 Kent Com., 444; *Nicholas v. Adams*, 2 Whart. 17; *Walter v. Ford*, 74 Mo. 195. It must be a delivery as a gift, and such a delivery, as in case of a gift *inter vivos* would invest the donee with the title to the subject of the gift.

In the case at bar the delivery actually made was not in execution or contemplation of a gift, so far as the evidence discloses. It was delivered to Charles McCord to hold as a bailee, and the language of the intestate, in the last interview he had with his son on the subject, was in substance, "After my death take it." The exact words were: "If I should not get well, take the money," etc. It was not: "Take the money, and, if I get well," make the disposition of the property I have directed.

And it will be observed that he not only attempted to make a testamentary disposition of the money, but of all the property he possessed. He directed that a deed should be made to his daughter of a tract of land in Jackson county; that not less than $100 of the money should be expended for his funeral expenses; that $600 should be given to his wife for her life interest in the Kirtley farm, of which Mrs. Kirtley was to be put in possession. It was a nuncupative will, made without the observance of the formalities required by the statute, and bequeathing an amount largely in excess of that of which the statute authorizes a disposition in that manner. If such a transaction is to be held a *donatio causa mortis*, the section of the statute in relation to nuncupative wills, and that requiring other wills to be in writing, signed by the testator, etc., have no force whatever.

All the statements with respect to the disposition of his property, made by the intestate, and testified to by McCord and wife, are to be taken as constituting one transaction. We can no more sever what was said in relation

to the cash, from what was said concerning the farms, and $600 to the wife, and funeral expenses, than one of those items can be dissevered from the other. Each was not a single transaction, standing alone, but all together constituted an entirety and were a testamentary disposition of all the property he owned, so far as the evidence shows, and even providing for the payment of debts, by directing the sale of the fifty-five acre tract for that purpose.

In the view we take of the case it is unnecessary to pass upon the competency of Charles McCord and wife as witnesses, and we, therefore, decline to do so.

The court should have rendered a judgment, either for or against the co defendants of Charles McCord, or as to them dismissed the suit. As they were not necessary parties to the suit, and on their own motion were made co-defendants, for a reason which can only be conjectured, and plaintiff has not appealed, complaining that no judgment was rendered against them, we shall reverse the judgment and remand the cause, with directions to the court below to enter a judgment in favor of plaintiff on the finding against Charles McCord, and dismiss the suit as to his co-defendants. All concur.

THE STATE TO THE USE OF WALSH v. FARRAR *et al.*, *Appellants.*

Administration: REPLEVIN: SURETIES. If a surety in a replevin bond given by an administrator pay a judgment in the action against the administrator, he will be entitled to recover the amount from the sureties in the probate bond of the administrator.

Appeal from St. Louis Court of Appeals.

AFFIRMED.

Cline Jamison & Day for appellants.

1. The object of an administrator's bond is to protect those who are entitled to a share in the estate, either as creditors or distributees, from the wrongful or negligent acts of the principal. There can be no recovery on such bond unless the plaintiff can show an interest in the estate. *Holmes v. Cock*, 2 Barb. Ch. 429; Brandt on Suretyship, p. 640, § 502; *Rawson v. Piper*, 34 Me. 98; Williams on Executors, 536, note l. And it must be a vested, not a contingent interest. *Stevens v. Cole*, 7 Cush. 467. Here, Walsh is neither creditor, heir, devisee nor legatee. Again, in taking property belonging to one not his intestate, he did not act as administrator, although in his individual judgment, he may have thought that the deceased had owned the thing replevied. But an administrator is not an insurer against loss, even when the property belongs to the estate. *Fudge v. Durn*, 51 Mo. 264. He is liable only for the care bestowed by a prudent man in the direction of his affairs. *State v. Meagher*, 44 Mo. 356.

2. The property converted by Dailey was not a part of the assets of the estate. This was so decided by the court. It is not even stated in the petition that Dailey inventoried it, or charged himself as administrator with it. It was something altogether without the funds upon which he was appointed to administer, and was no part of the estate which the bond was given to protect. Judgment, therefore, recovered against Dailey in the circuit court was not an order or decree touching the administration, nor was it decided that the estate was in any way liable to the respondent here. The due administration of the estate, for which an administrator gives security, consists in paying its obligations and distributing the balance to the parties entitled to it. *Cunningham v. Souza*, 1 Redf. 462. The surety is only bound for the faithful performance of the duties of an administration. *Harker v. Irick*, 10 N. J.

Eq. 269. As the surety of an administrator will be liable only for the faithful administration of such assets as he had a right to receive and was, therefore, bound to administer, he would not be chargeable for the misapplication of assets received without authority. *Fletcher v. Sanders*, 7 Dana 345, 350. In taking the property Dailey entirely transcended his power as administrator, and made himself liable, not in his official capacity, but as a private individual simply, to return it. As it never was a part of the estate, Dailey, as administrator, should never have taken it, and that being determined, it remained only that Dailey, not the estate, should be decreed to make reparation. The sureties on an official bond are entitled to have their liability strictly construed.

The very fact that the law required a replevin bond to be given before Dailey could take the property, is a very strong argument that the bond given by him as administrator was not intended to cover the property in case it should appear that it was not part of the estate.

George M. Stewart for respondent.

1. It is settled in this State that an administrator may bring replevin; (*McDonald v. Walton*, 2 Mo. 49;) and in the event of a judgment against, it must be *de bonis testatoris*. *Ranney v. Thomas*, 45 Mo. 112. See also *Wooldridge v. McDonald*, 15 Mo. 470; *State v. Maulsby*, 53 Mo. 500; *Ross v. Alleman*, 60 Mo. 269. Patrick Roddy's judgment, therefore, was against Dailey as administrator. This was not a demand which could have been proven against the estate. *Presbyterian Church v. McElhinney*, 61 Mo. 540; *Wernecke v. Kenyon*, 66 Mo. 275. It was, however, a demand for which the sureties of Dailey were liable. *Dix v. Morris*, 1 Mo. App. 93; *Dix v. Morris*, 66 Mo. 514; *State v. Creusbauer*, 68 Mo. 254. Dailey, as administrator, had taken the property by virtue of the order of delivery, and the effect of the judgment being that he had wrong-

fully taken it, the defendant elected to take a money judgment for its value. In fact, no loss falls on the sureties, for they are only compelled to restore the value of property which the administrator had received and made part of the estate of the decedent by virtue of the process awarded him, upon the giving of the bond upon which plaintiff became surety. The estate is not impaired or injured thereby. It wrongfully received this amount and it must be restored. The judgment of the circuit court upon which this action was based was, that Dailey, as the administrator and representative of the estate, should restore to the plaintiff the money which he had mistakenly placed among the assets of the estate, and which, by subrogation, belonged to the plaintiff. He failed to obey this order and his sureties on his administration bond became liable.

2. The plaintiff Walsh stands substituted to the rights of Patrick Roddy, as they were before the judgment was paid. *Haren v. Foley*, 18 Mo. 136; *s. c.*, 19 Mo. 632; *Burnside v. Fetzner*, 63 Mo. 107; *Allison v. Sutherlin*, 50 Mo. 274.

3. The order of the circuit court made upon the administrator to pay the plaintiff the amount he had paid to satisfy the judgment in the replevin case was imperative, and the disobedience of it a breach of the administration bond, and the sureties were concluded by this order. *State v. Holt*, 27 Mo. 340; *Taylor v. Hunt*, 34 Mo. 205; *State v. Coste*, 36 Mo. 437; *Townsend v. Townsend*, 60 Mo. 246; *McCartney v. Garneau*, 4 Mo. App. 566. This order or judgment was against Dailey as administrator, and directed him to pay the amount named out of the assets and property of the said estate. *Ranney v. Thomas*, 45 Mo. 112.

HOUGH, C. J.—Thomas J. Dailey, as administrator of the estate of James Roddy, deceased, brought an action of replevin against Patrick Roddy for certain specific personal property alleged to be the property and assets of said estate. Said Dailey gave bond in the sum of $4,775, and,

as administrator as aforesaid, received the property sued for from the sheriff. Walsh, to whose use this suit is brought, was one of the sureties on said bond. Judgment was finally rendered in said replevin suit in favor of Patrick Roddy, and against the sureties in the replevin bond, for the sum of $3,000 and costs of suit. Under execution issued on said judgment Walsh was compelled to pay said sum of $3,000, and the further sum of $88.60 costs, Dailey, the administrator, and the other surety on the replevin bond being insolvent. On motion in the circuit court, judgment was rendered in favor of Walsh against said Dailey, as administrator, for the sum so paid by him with interest, and said Dailey, as administrator, was ordered by the circuit court to pay said sum to Walsh, which, after demand, he refused to do. Thereupon this suit was instituted against said Dailey and the sureties on his bond as administrator, to recover said sum so paid by Walsh. And a judgment was rendered for the plaintiff in the circuit court, which was affirmed by the court of appeals.

The only question presented for determination is, whether, on the facts stated, the plaintiff has a good cause of action against the sureties in the administrator's bond.

It is settled in this State that an administrator, as such, may maintain replevin, and when judgment is rendered against him for the value of property received by him in such suit, the judgment should be against him *de bonis testatoris;* (*Ranney v. Thomas*, 45 Mo. 112;) and the sureties of an administrator would undoubtedly be liable, if he should negligently omit to bring such action for property belonging to the estate, whereby it should be lost. Dailey having by means of the replevin suit become possessed of property as belonging to the estate, which the circuit court decided did not belong to it, it was his duty as administrator to pay the value thereof to its owner. And the plaintiff having paid it for him under the judgment of the circuit court, became subrogated *ipso facto*, to all the rights of Patrick Roddy, to whom restitution should in

the first instance have been made. Now the claim of Patrick Roddy to re-imbursement did not constitute a demand which could be allowed against the estate of James Roddy, but it was a claim against Dailey in his official capacity, arising out of the improvident exercise of his official functions, which it was his official duty as administrator to pay, and for a breach of which duty, the sureties on his bond are liable.

Besides, the circuit court had jurisdiction in the replevin suit to direct Dailey, the administrator, to pay Walsh out of the assets in his hands as administrator, inasmuch as he had taken into his possession, as administrator, the property of Patrick Roddy; and by the terms of the bond of Dailey, the parties are responsible for a failure on his part to perform all things touching his administration required by "the order or decree of any court having jurisdiction." R. S., § 19. *Vide De Valengin's Admr. v. Duffy*, 14 Peters, *loc. cit.* 290; *Simpson v. Snyder*, 54 Iowa 557.

The judgment of the court of appeals will be affirmed. The other judges concur.

THE CITY OF KANSAS v. THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Appellant.*

1. **Record of Deed**: SEAL OF OFFICER. Where a record of a deed shows a scroll affixed to a notary's certificate of acknowledgment, it will be admissible in evidence, though there is no recital either in the body of the certificate or in the testimonium clause thereof that the certificate is given under seal.

2. **Corporation Deed**: FORM OF SIGNATURE: SEAL: ACKNOWLEDGMENT. The granting clause of a deed, the record of which was offered in evidence, was as follows: "Know all men by these presents, that the W. K. Land Company, by S. H., President, and T. S. C., Secretary, * * has granted," etc. The attestation clause and

signatures were as follows: "In witness whereof, we hereunto subscribe *our* names and affix *our* seals." (Signed) "S. H., President, (Scroll); T. S. C., Secretary, (Scroll); W. K. Land Company, (Scroll)." The certificate of acknowledgment stated that S. H., President, and T. S. C., Secretary, "acknowledged that they executed and delivered the same as their voluntary act and deed." *Held*, that the deed was the deed of the corporation. The form of signature did not make it the individual deed of S. H. and T. S. C.; and one of the seals appearing on the record would be presumed to be the seal of the corporation.

HOUGH, C. J., and HENRY, J., dissented on the ground that the deed was not sealed with the common seal of the corporation and was not acknowledged to be the act of the corporation.

3. **Taxes**: ASSESSMENT AS EVIDENCE OF OWNERSHIP. Where a statute provided that the tax-book should be received as evidence of all the facts stated therein, *Held*, that in a suit against H., grantee of J., to enforce the lien of certain taxes, the assessment of the property to J. would be evidence of the ownership of H.

4. **Practice**: EVIDENCE. This court will not consider an objection to evidence not made at the trial.

5. **Taxes**: ACTION TO RECOVER: PROPER DEFENDANT: JUDGMENT AGAINST THE LAND. In a proceeding by the City of Kansas, under its charter, to enforce against land a lien for taxes due thereon, all persons having an interest in the land at the commencement of the suit should be made defendants. If any one be made defendant, who has no interest, he must disclaim by answer. But whether he do so or not a judgment for the city would be an error of which he could not complain, since it would be against the land and not against him personally.

6. ——: KANSAS CITY. Under the charter of Kansas City of 1875, the city has a lien on land for interest accrued on delinquent taxes as well as for the taxes themselves.

Appeal from Jackson Circuit Court.—HON. S. H. WOODSON, Judge.

AFFIRMED.

Geo. W. Easley for appellant.

D. S. Twitchell and *C. E. Small* for respondent.

NORTON, J.—This suit was brought by the City of Kansas to enforce a lien for taxes on certain lots and blocks of ground in said city for the years 1867, 1868, 1869, 1873,

1874, 1875, 1876 and 1877. All the parties defendant, of whom there were several, made default, except the Hannibal & St. Joseph Railroad Company, and it filed an answer containing a general denial of the allegations of the petition, and also setting up the statute of limitations in bar of plaintiff's right to recover the taxes for the years 1867, 1868 and 1869.

So much of the answer as set up the limitation act was stricken out on plaintiff's motion, to which defendant excepted. In order to avoid further reference to the action of the court in this respect, it may be observed that a determination of the question, whether said defense was or not properly stricken out, is dispensed with, inasmuch as the court found for defendant as to the taxes for the years 1867, 1868 and 1869.

On the trial plaintiff had judgment for the enforcement of its lien for taxes, interest and costs for all the other years mentioned in the petition. From this judgment defendant corporation has appealed, and the chief grounds alleged in the motion for a new trial are, that the court erred in admitting evidence and in refusing instructions asked by defendant.

During the trial plaintiff offered in evidence the record of a quit-claim deed dated June 23rd, 1877, from James F. Joy and wife conveying to defendant all of blocks Nos. 20, 21 and 34, except fifty feet wide off the west side of block 20 on the river front in Kansas City, Jackson county, Missouri. The record of this deed, as well as another conveying certain other lots in Kansas City to defendant, was objected to on the sole ground that the notary's certificate of acknowledgment was not, and did not purport to be, attested by his notarial seal or any seal whatever. The court did not err in overruling this objection. It has been expressly held by this court that when the notary attaches to his certificate his notarial seal it is not necessary that the testimonium clause of the certificate should show that the seal was affixed, or

1. RECORD OF DEED: seal of officer.

that it should be stated in the body of the certificate that it was executed under the seal of the notary. It has also been held that all a recorder is required to do in recording a deed having the official seal of a notary attached to his certificate is to make some proper entry on the record indicating the place or situation of the seal—such for instance as [SEAL] or [L. S.]; *Dale v. Wright*, 57 Mo. 110; *Clark v. Rynex*, 53 Mo. 380; *Gray v. Kansas City*, 61 Mo. 378; *Parkinson v. Caplinger*, 65 Mo. 290. The copy of the record of the deeds offered in evidence and objected to showed that the notarial seal was affixed to his certificate by the usual way of indicating seals—thus [L. S.]

The plaintiff also offered in evidence the record of a deed from the West Kansas Land Company by Solomon Houck, President, and Theo. S. Case, Secretary, to James F. Joy, dated October 27th, 1868, conveying to him blocks numbered 20, 21 and 34 in West Kansas City addition No. 1, Jackson county, Missouri. This deed was objected to on the ground that it had not been acknowledged as the deed of the West Kansas Land Company, but as the deed of Houck and Case; and also on the ground that the corporate seal of said land company was not affixed, but instead thereof the seals of said Houck and Case.

2. CORPORATE DEED: form of signature: seal: acknowledgment.

The granting clause in this deed is as follows:

"Know all men by these presents: That the West Kansas Land Company, by Solomon Houck, President, and Theodore S. Case, Secretary, * * has granted * * "

The attestation clause and signatures are as follows:

"In witness whereof we hereunto subscribe our names and affix our seals this 27th day of October, 1868.

[SEAL.]

SOLOMON HOUCK, President. [SEAL.]

THEODORE S. CASE, Secty. [SEAL.]

W. K. LAND CO." [SEAL.]

"STATE OF MISSOURI, }
County of Jackson. }

Be it remembered that S. Houck, President, and Theo. S. Case, Secretary, who are personally known to the undersigned, a notary public within and for said county, to be the persons whose names are subscribed to the foregoing deed as parties thereto, this day appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed for the purposes therein mentioned.

Given under my hand this 27th day of October, 1868.

[SEAL.]

JOHN R. BALIS,
Notary Public."

Reading the acknowledgment in connection with the deed, the signatures and seals, as indicated by the record, we are of the opinion that the trial court ruled properly in holding the instrument to be the deed of the West Kansas Land Company. That company is named as the grantor in the body of the deed, acting by and through Houck, President, and Case, Secretary. The fact that it was not signed West Kansas Land Company by said Houck and Case—but by said Houck, President, and Case, Secretary, West Kansas Land Company—does not make it the deed of said Houck and Case, and it was so held in the case of *Shewalter v. Pirner*, 55 Mo. 218, where a similar question was presented.

Although it is stated in the testimonium clause of the deed, that "we hereunto subscribe our names and affix our seals," it will be observed that there were four seals to the deed, one opposite the name of Houck, Pres't, one opposite the name of Case, Secretary, one opposite the name W. K. Land Company, and one standing isolated. We think the presumption can be fairly indulged that one of these seals was the seal of the company. Such a presumption can be as fairly indulged, as it is in a case where the record indicates by a scroll attached to the certificate of a

notary that the seal thus indicated is his notarial seal, although he only states in the testimonium of his certificate that he subscribes his name. It is the seal of the notary which gives efficacy to his certificate, as it is the seal of the corporation which gives efficacy to the deed of a corporation. "When the common seal of a corporation is affixed to an instrument and the signatures of the proper officers are proved, the courts are to presume that the officers did not exceed their authority. The contrary must be shown by the objecting party." *St. Louis Public Schools v. Risley*, 28 Mo. 415. "In aid of a certificate of acknowledgment, reference may be had to the instrument itself or any part of it. It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances or the proof of them to be defeated by technical or unsubstantial objections." *Carpenter v. Dexter*, 8 Wall. 513.

It appears from the evidence that the said blocks 20, 21 and 34 included in the said deed from Joy to the Han-

3. TAXES: assessment as evidence of ownership.

nibal & St. Joseph Railroad Company, and which plaintiff was seeking to subject to sale for the taxes due upon it, were assessed to said Joy as owner; and it also appears from the 82nd section of plaintiff's charter, (Acts 1875, p. 243,) that this was evidence of Joy's ownership of the property assessed. Had the court, therefore, excluded said deed, plaintiff's right to a judgment would have been unaffected thereby, inasmuch as whatever interest Joy had in said blocks, had been conveyed to the Hannibal & St. Joseph Railroad Company by the deed of said Joy dated June 23rd, 1877, which we have said was properly received in evidence.

It is also objected that the deed from Joy to defendant corporation conveying blocks 20, 21 and 34 in Kansas City

5. PRACTICE: evidence.

ought not to have been admitted to show title to blocks 20, 21 and 34 in West Kansas addition to Kansas City. No such objection as this was made to the introduction of the deed, and it cannot, there-

fore, be considered. The only objection to its introduction was that the notary did not affix his seal to his certificate, and so state in the testimonium clause thereof.

Defendant asked and the court refused the following instructions:

2. There is no evidence in the case that defendants are owners of any of the property mentioned in the petition.

3. There is no evidence in the case that defendants, or any of them, are or ever have been owners of blocks 20, 21 and 34 mentioned in the petition, and there can be no recovery for any taxes levied upon said property.

4. Before the plaintiff can recover on account of the taxes on any lot or block mentioned in the petition, it must prove that some one or more of the defendants now is, or has at some time been, owner of such lot or block.

The second and third instructions were properly refused if for no other reason than the fact that the charter, as before stated, declared that the assessment of the property to Joy as owner, should be received as evidence of his ownership.

As to the fourth instruction, it may be said, as it was said in the case of *Seibert v. Allen*, 61 Mo. 488, "that in a proceeding like this it is not easy to determine what importance is to be attached to the ownership of property sought to be charged. No direct adjudication is required as to ownership, and if any were made it would certainly be of no binding force upon those who were neither parties nor privies to the record, and yet a personal defendant seems to be necessary, although under the law no judgment can be rendered against him." Besides this, the statute under which this suit is prosecuted, authorizes parties having an interest in the property at the commencement of the suit to be made parties, and if defendant corporation had no interest in the property sought to be charged, it was not a proper party, and advantage should have been taken of it by answer.

5. TAXES: action to recover: proper defendant: judgment against the land.

If any personal judgment was or could have been rendered against defendant corporation, it might be in a position to complain of any error committed, but as no such judgment was or could be rendered, we are at a loss to perceive how any error committed could affect the defendant if it had no interest in the property sought to be subjected to sale.

It is also insisted that the plaintiff had no legal capacity to sue without averring that the real estate against which the lien for taxes was sought to be enforced, had either been discontinued from sale, or had been sold and bid off by the city, or had become delinquent before March 24th, 1875. Inasmuch as it sufficiently appears from the petition that the taxes for the years 1873 and 1874 were delinquent before the 24th of March, 1875, the objection made is not well taken, even if defendant had put itself in a position to avail itself of such an objection by filing a motion in arrest of judgment, which was not done.

It is also insisted that the judgment is excessive in this, that the court allowed twenty-four per cent interest on the delinquent tax. It is argued that the tax is only declared to be a lien on real estate. We think this argument unsound, and that it is so, is shown by sections 41, 42 and 77 of the charter, pages 231 and 242, Laws 1875. It is provided in section 41 that after taxes become delinquent they shall bear interest at the rate of twenty-four per centum per annum, and that the taxes shall be a perpetual lien on real estate against all persons. It gives the city collector power to collect such taxes by the sale of real estate upon which they are levied; and section 42 requires him to make such sale for and in payment of the total amount of taxes, interest and costs due on such real property. When suits are brought for the enforcement of the lien for taxes, section 77 contemplates that the judgment rendered shall be for the taxes, costs, interest and penalties.

6. ——: Kansas City.

There is no pretense but that the taxes, the payment

of which is sought to be enforced, were properly assessed and levied; and no question as to the fact that they were due and unpaid; and finding no error in the record of which appellant can complain, the judgment is affirmed. in which all concur.

HOUGH, C. J., AND HENRY, J.—We concur in the result arrived at. We are of opinion, however, that the deed of the West Kansas Land Company was not legally executed and was not properly acknowledged. The statute in regard to conveyances by corporations is as follows: "It shall be lawful for any corporation to convey lands by deed, sealed with the common seal of said corporation, and signed by the president, or the presiding member or trustee of said corporation, and such deed, when acknowledged by such officer to be the act of the corporation, or proved in the usual form prescribed for other conveyances of lands shall be recorded in the recorder's office of the county where the land lies, in like manner with other deeds." The deed does not purport to be sealed with the seal of the corporation. The officers signing the deed do not pretend to acknowledge it as "the act of the corporation," but as their act. In *Sandford v. Tremlett*, 42 Mo. 384, it was said: "The law still seems to be well settled that the common seal of a corporation is to be taken as the only proper evidence of its act in all cases where a seal would be required, if the instrument is to be executed by an individual." In *Musser v. Johnson*, 42 Mo. 78, it was said: "If a conveyance of real property, purporting to be the conveyance of a corporation made by one authorized to make it for them, be in fact executed by the attorney or agent in his own name as his own deed, it will not be the deed of the corporation, although it was intended to be so, and the attorney or agent had full authority to make it so." It is well settled that the body of the deed may be referred to in aid of an acknowledgment, but this rule has never been held to mean that we may expunge from an acknowledgment

plain and unambiguous words, which render it defective, and substitute therefor words enough taken from the body of the deed, to make the acknowledgment good. *Lincoln v. Thompson*, 75 Mo. 613. This would be to make an acknowledgment, and not simply to interpret it, by reference to the deed.

Motion for rehearing overruled.

THE STATE *ex rel.* THE ATTORNEY GENERAL v. MASON.

Election: QUO WARRANTO. In a *quo warranto* proceeding this court will not enter into an inquiry as to the legality of votes or the qualifications of voters. The statute provides another tribunal and a different mode of determining these matters, and this provision is exclusive.

Quo Warranto.

WRIT DENIED.

D. H. McIntyre, Attorney General, *A. R. Taylor* and *E. T. Farish* for relator.

John M. Krum, *Chester H. Krum* and *Smith & Krauthoff* for respondent.

HENRY, J.—This is a proceeding in the nature of a *quo warranto*, the object of which is to oust respondent from the office of sheriff of the city of St. Louis, which, it is alleged, he has usurped.

In his answer to the writ, the respondent alleges that, on the 7th day of November, 1880, at a regular election held in that city, he was duly elected to the office for a term of two years, commissioned and qualified, etc.; that again, at the regular election in 1882 he was elected to the same office, received a certificate of his election from the

register of said city and a commission from the Governor of the State, that he took the oath of office, executed the bond required, and entered upon the discharge of the duties of the office, and has ever since held and now holds said office; that if not elected at the last election, no one else was, and that under the constitution of the State, if he does not hold under the election of 1882, he is rightfully in office under the election of 1880, and entitled to hold the same until some one shall have been duly elected and qualified as his successor.

The replication admits that respondent was duly elected in 1880, as alleged in the answer, but denies that he was elected in 1882. It admits that he received from the register a certificate of his election, that he was commissioned by the Governor, and qualified, etc., but alleges that there were counted 5,000 illegal ballots, as received by him, which deducted from the vote returned for him, left a majority of the legal votes cast in favor of Lawrence Harrigan, who was one of the competitors for the office. A motion was filed by respondent to strike out that portion of the replication relating to illegal ballots, and this presents a question, which, if determined in favor of respondent, is decisive of the case.

In the *State ex rel. Attorney General v. Vail*, 53 Mo. 97, this court, in an opinion delivered by Judge Napton, in which the subject is treated with the ability which distinguished that learned judge, observed: "The next inquiry is the allegation in the return, or answer, that the defendant was duly elected by a majority of the qualified voters. The court might pass over the plea as evasive and equivocal, but conceding it to be an indirect assertion that the defendant was elected by reason of the number of illegal votes cast for his competitor, the question is presented, whether the court will, in this proceeding undertake to examine the truth of this allegation. In our opinion we have no such power." He then proceeds to give satisfactory and conclusive reasons why this court cannot enter

into that investigation, among others, that: "The election law in this State affords ample means of contesting elections on the ground of illegality of votes cast; but a notice is required and specification of the names of all the voters objected to. 1 Wag. Stat., 573, § 54. If it be admitted that this inquiry into the qualification of voters is still open in a proceeding in *quo warranto*, still the court would certainly require what the statute requires in contested elections—a previous notification and a complete list of the voters whose qualifications are meant to be disputed." In further support of his argument we may suggest that the 9th section of article 8 of the present constitution provides that: "The general assembly, by general law, shall designate the court or judge by whom the several classes of election contests shall be tried, and regulate the manner of trial, and all matters incident thereto." Section 5529 of the Revision of 1879, provides that: "In every case of a pending contested election, the person holding the certificate of election may give bond, qualify and take the office at the time specified by law, and exercise the duties thereof until the contest shall be decided."

While section 3, article 6 of the constitution gives to this court "power to issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari* and other original remedial writs, and to hear and determine the same," in the hearing and determination thereof, the mode of procedure and the principles to obtain, are those of the common law; and in the *State ex rel. v. Vail*, *supra*, this court came to the conclusion that, at common law, where a mode of contesting an election was provided, the court, in a *quo warranto* proceeding, would not enter into an inquiry as to the legality of votes, or the qualification of voters. Here, under a constitutional provision requiring it, the legislature has provided a mode of contesting this election on those grounds, and a tribunal to hear and determine it, other than this court, and neither the State nor an individual, by a proceeding in *quo warranto*, can have a judgment of ouster

in a case where it becomes necessary to inquire, either into the legality of ballots or the qualification of voters in order to render such a judgment. In the *State ex rel. v. Townsley*, 56 Mo. 113, the doctrine announced in *State v. Vail*, *supra*, on this subject was reiterated by this court in an opinion delivered by Judge Napton, and we see no reason for following adjudications to the contrary in other States; but if our own decisions left the matter in doubt, the hindrance to the transaction of the regular business of this court, which would be occasioned by throwing wide open its doors to such controversies, would be a strong argument in favor of the doctrine so clearly announced in the cases above cited. Every contested election case in the State might be commenced here, and the court would find no time for the transaction of other business.

It was stated in the oral argument of this cause by respondent's counsel, and not denied, that there is now a contest pending between Mason and Harrigan under the election law, in this very case, and if it be true that such a contest is pending, the statute expressly declares that, "the person holding the certificate of election may give bond, qualify and take the office at the time specified by law, and exercise the duties thereof, until the contest shall be decided." We do not place our judgment, however, on the fact (which is not in this record) that such a contest is pending, but, that resort may be had by Harrigan to that remedy for the trial of his right to the office of sheriff of the city of St. Louis.

The motion to strike out that part of the replication relating to the 5,000 illegal ballots is sustained. All concur.

THE STATE v. BRUCE, *Appellant.*

Indictments must be Signed. Under the present statute, (R. S. 1879, § 1798,) an indictment not signed by the prosecuting attorney, is a nullity.

Appeal from Nodaway Circuit Court.—HON. H. S. KELLEY, Judge.

REVERSED.

Frank Griffen for appellant.

D. H. McIntyre, Attorney General, and *Edwards & Ramsey* for the State.

HENRY, J.—The defendant was indicted at the November term, 1881, of the Nodaway circuit court for perjury, and on a trial was found guilty and sentenced to six years' imprisonment in the penitentiary. He has appealed from the judgment, and the only question for our consideration is, whether the failure of the prosecuting attorney to sign the indictment is fatal to it.

Section 1798 of the Revised Statutes of 1879, provides that: "Every indictment must be signed by the prosecuting attorney, and when the grand jury return any indictment into court, the judge must examine it, and, if the foreman has neglected to indorse it 'a true bill,' with his name signed thereto, or, if the prosecuting attorney has not signed it, the court must cause the foreman to indorse or the prosecuting attorney to sign it as the case may require, in the presence of the jury." This section is imperative with regard to the signature of the prosecuting attorney. It is a new section, and never, in this State, before its enactment, was the prosecuting attorney required to sign an indictment.

In *Thomas v. The State*, 6 Mo. 457, the objection was made that the indictment was not subscribed by the circuit

attorney, and the defendant relied upon the 6th section of article 3 of the act to regulate practice at law, Revised Statutes 1835, which directed that declarations and other pleadings should be signed by the party or his attorney; but the court held that that statute had no application to practice in criminal cases, and Judge Tompkins, who delivered the opinion of the court, observed that he was not aware of any provision in the act regulating practice in criminal cases requiring the circuit attorney to subscribe his name to indictments.

The act of 1835, and every revision of the statute since made, contained a provision, that no indictment can be found without the concurrence of at least twelve grand jurors, and when so found, and not otherwise, the foreman of the grand jury shall certify under his hand that it is "a true bill." It has been repeatedly held that when the grand jury in a body has returned an indictment into open court, and the records show that fact, the omission of the certificate of the foreman is not fatal to the indictment. The object of that section manifestly is to establish the fact that twelve of the body concurred in preferring the indictment. It did not require the foreman's certificate to make a good indictment, but to establish a fact which was essential to make it a good indictment. It was for no other purpose, and that fact the court held to be equally as well established by the return of the indictment in open court as a true bill, and its finding as such among the records of the court. *State v. Mertens*, 14 Mo. 94; *State v. Burgess*, 24 Mo. 381.

There was a purpose in the enactment of section 1798, *supra*. It imperatively requires the signature of the prosecuting attorney to an indictment. Under that section his signature is essential, not to establish a fact which may be otherwise established, but to perfect and complete the indictment. If a mere formal matter which may be dispensed with, why the special provision requiring the judge to examine the indictment, and see if the signature is attached,

and if not to require the prosecuting attorney to sign it? It may be said that the same duty is imposed upon the judge with respect to the foreman's certificate. That is true, and the legislature, aware of the decisions of this court on that subject, above referred to, intended, we presume, to provide a way of securing the certificate of the foreman, and not leave so important a fact as the concurrence of a requisite number of the grand jury in finding a bill to be ascertained otherwise. We are satisfied that no paper can be regarded as an indictment without the signature of the prosecuting attorney, and the certificate of the foreman of the grand jury that it is a true bill. Both are required, and neither is a mere formality that may be dispensed with. The judgment is reversed and the cause remanded. All concur.